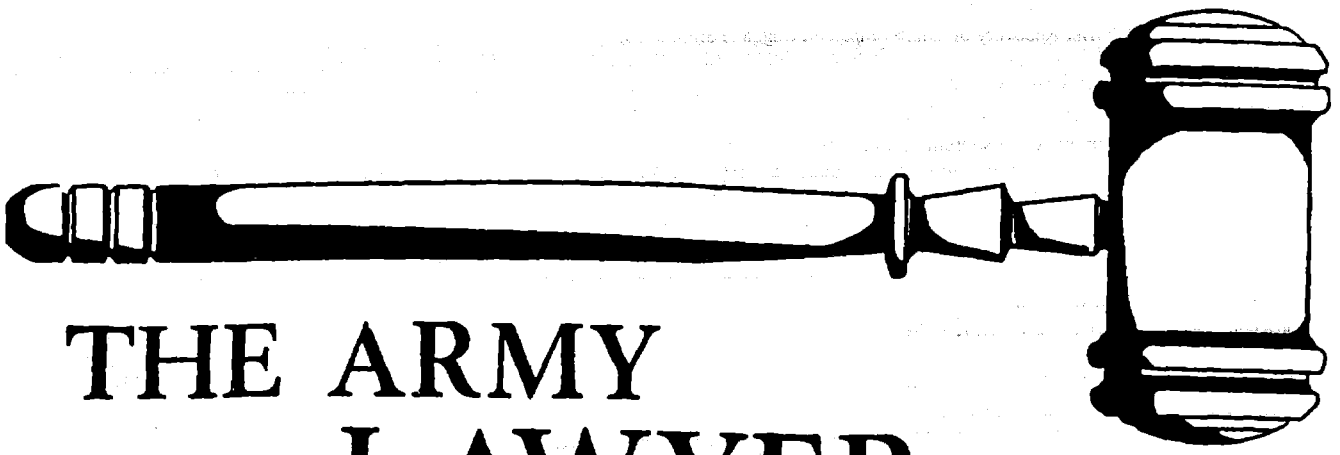
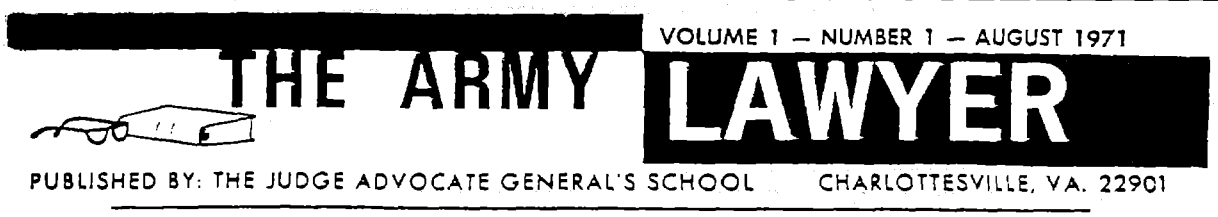


THE ARMY LAWYER

Headquarters, Department of the Army

Department of the Army Pamphlet 27-50-250
September 1993

Table of Contents



This is the 250th issue of *The Army Lawyer.* In August 1971, The Judge Advocate General's School published the first issue of *The Army Lawyer.* Reprinted above is the original logo as it appeared twenty-two years ago.

Articles

The Army Lawyer (ISSN 0364-1287)

Editor
Captain John B. Jones, Jr.

The Army Lawyer is published monthly by The Judge Advocate General's School for the official use of Army lawyers in the performance of their legal responsibilities. The opinions expressed by the authors in the articles, however, do not necessarily reflect the view of The Judge Advocate General or the Department of the Army. Masculine or feminine pronouns appearing in this pamphlet refer to both genders unless the context indicates another use.

The Army Lawyer welcomes articles on topics of interest to military lawyers. Articles should be typed double-spaced and submitted to: Editor, *The Army Lawyer*, The Judge Advocate General's School, U.S. Army, Charlottesville, Virginia 22903-1781. Footnotes, if included, should be typed double-spaced on a separate sheet. Articles also should be submitted on floppy disks, and should be in either Enable, WordPerfect, Multimate, DCA RFT, or ASCII format. Articles should follow *A Uniform System of Citation* (15th ed. 1991) and *Military Citation* (TJAGSA, July 1992). Manuscripts will be returned only upon specific request. No compensation can be paid for articles.

The Army Lawyer articles are indexed in the *Index to Legal Periodicals, the Current Law Index, the Legal Resources Index,* and the *Index to U.S. Government Periodicals.*

Individual paid subscriptions are available through the Superintendent of Documents, U.S. Government Printing Office, Washington, D.C. 20402.

Address changes: Reserve Unit Members: Provide changes to your unit for SIDPERS-USAR entry. ***IRR, IMA, or AGR:*** Provide changes to personnel manager at ARPERCEN. ***National Guard and Active Duty:*** Provide changes to the Editor, *The Army Lawyer*, TJAGSA, Charlottesville, VA 22903-1781.

Issues may be cited as ARMY LAW., [date], at [page number].

Second-class postage paid at Charlottesville, VA and additional mailing offices. **POSTMASTER:** Send address changes to The Judge Advocate General's School, U.S. Army, Attn: JAGS-DDL, Charlottesville, VA 22903-1781.

Uses of Battered Person Evidence in Courts-Martial

Major Richard B. O'Keeffe, Jr.
Senior Defense Counsel, United States Army Trial Defense Service, Fort Campbell, Kentucky

Introduction

> A noted gunslinger of the Old West—chastised for his readiness to settle arguments with hot lead—is reported to have justified his style of debate by saying, "I never killed a man that didn't need killin'."[1]

A growing number of social scientists and legal scholars believe that a person—usually a woman—may be subjected to physical and mental abuse over a period of time by a significant other, and thereby become legally unable to avoid criminal conduct. The notion that such victims could be excused for their crimes on the basis of such circumstances has gained widespread acceptance in recent years from the public and the courts.

The evidence offered to excuse criminal conduct in persons oppressed in such a manner is called battered person evidence (BPE).[2] The popular media and the legal academy recently have paid lavish attention to the allegedly heretofore ignored phenomenon of chronic, systematic, domestic abuse, and its implications for the criminal justice system.[3] This attention has been mirrored by both the state and federal benches.[4]

Heightened posttrial scrutiny of the cases involving women who have killed their battering mates has led to special clemency programs in at least twenty-six states. Their mission is to take a more sympathetic look at such cases.[5] The rallying cry for proponents of this movement is Darwinian: "Victims of perpetual violence should be forgiven if they turn violent themselves."[6] Battered persons evidence's most sensational use, however, is by defendants charged with killing their abusers while their abusers either were helpless—that is, asleep or unaware—or not actively threatening harm, under the rubric of self-defense. In this article, this use of BPE is denominated as "non-traditional self-defense."[7] Such a defense, flying in the face of both public perceptions regarding self-defense as well as legal tradition and the common law, has raised concerns in the prosecutorial bar[8] and with legal scholars.[9]

Battered person evidence may cause sleepless nights for prosecutors, and it may cause abusive husbands to glance nervously over their shoulders. Its greatest legal impact, however, may well come in areas that have escaped the scrutiny of the mainstream media; cases involving, not homicide, but more mundane crimes such as robbery, wire fraud, larceny, unauthorized absence, or drug dealing. Battered person evidence will be applied not only to self-defense, but also to duress, coercion, lack of specific intent, traditional self-defense, or extenuation and mitigation. After describing, in general terms, BPE and the Battered Person Syndrome (BPS), this article will discuss some of the varied uses for BPE in the civilian courts, and the prospects for its successful use in courts-martial.[10] The article concludes that BPE is, in many

---

[1] Kenneth R., *Minnesota Rag,* UPI, June 30, 1981 (available in LEXIS, Nexis Library, UPI File by reviewing Fred W. Friendly, *Minnesota Rag* (1981)).

[2] The term "battered person evidence" (BPE) was coined by the author. Terms such as "battered woman syndrome" or "battered spouse/wife syndrome" evidence—though more widely used by the courts and media—fail to encompass the full spectrum of uses for evidence of this type. Battered person evidence, as this article will discuss and as the courts have recognized, includes both genders as abuser and abused, and all intimate relationships, from friendship, to parent-child, to husband-wife.

[3] *See, e.g.,* Nancy Gibbs, *'Til Death Do Us Part,* TIME, Jan. 13, 1993, at 38.

[4] See *infra* Appendix (graph, "Battered Person Evidence and the Courts"). In spite of the authoritative, scientific appearance of this graph, the author denies that the graph actually possesses such characteristics. The numbers of cases per year were obtained by running a search in the Lexis/Nexis STATES library, MEGA file as follows: "battered woman! and date (= 19XX)." The figure does not show the numbers of cases in which BPE was involved in the holding. The graph, however, does demonstrate the exponentially increased attention that BPE has enjoyed in the past decade.

[5] Gibbs, *supra* note 3, at 40.

[6] *Id.*

[7] Erich D. Andersen & Anne Read-Andersen, *Constitutional Dimensions of the Battered Woman Syndrome,* 53 OHIO ST. L.J. 363, 383 n.137.

[8] Orlando prosecutor, Dorothy Sedgwick, commenting on a celebrated case involving BPE in which the allegedly battered woman was convicted of murdering her husband despite a nontraditional self-defense defense, said, "Rita Collins is a classic example of how a woman can decide to kill her husband and use the battered woman's syndrome as a fake defense. . . . She lured him to his death. He was trying to escape her." Gibbs, *supra* note 3, at 40.

[9] *See, e.g.,* Acker & Toth, *Battered Women, Straw Men, And Expert Testimony: A Comment on State v. Kelly,* 21 CRIM. L. BULL. 125 (1985); Note, *The Battered Woman Syndrome and Self-Defense: A Legal and Empirical Dissent,* 72 VA. L. REV. 619 (1986); Note, *Does Wife Abuse Justify Homicide?,* 24 WAYNE L. REV. 1705 (1978); *see generally,* Comment, *Human Biology and Criminal Responsibility: Free Will or Free Ride?,* 137 U. PA. L. REV. 615 (1988).

[10] Because of the close similarity between the military and federal rules of evidence, this article will discuss primarily federal and military cases.

respects, not very different from evidence already accepted by courts-martial for a variety of purposes, and that the use of BPE to support a nontraditional self-defense defense probably would be rejected by military courts.

Description of BPE[11]

Battered person evidence encompasses lay witness and expert witness testimony as well as ancillary real evidence—usually records of medical treatment—that are offered to prove the defendant's affliction with BPS. Lay witnesses normally recount incidents of abuse and threats of violence by the abuser.

Experts typically are social workers or psychologists who either have written about or treated battered persons. In testimony, such experts describe the BPS and offer opinions as to whether the defendant suffers from BPS. As the case discussions will demonstrate, men can proffer BPE, children can proffer BPE against their parents, and girlfriends can proffer BPE against boyfriends.

The common theme in all relationships giving rise to the BPS is a continuing daily intimacy or close contact in which the dominant party, or abuser, subjects the abused party to a repeated cycle of violence. The cycle begins with a gradual heightening of tension, arguments, and verbal or psychological abuse. It then escalates to minor acts of physical abuse. The cycle culminates in a climax involving physical abuse serious enough to warrant medical treatment or the intervention of law enforcement authorities. Following a period of remorse and contrition by the abuser, the couple reunites and commences a new cycle of tension and violence.

Attempts to leave or escape the abusive relationship may be thwarted either by the physical or psychological strength of the abuser or by the abused's lack of emotional, psychological, or economic resources. Efforts to seek the protection of the law may be frustrated by a callous attitude on the part of the authorities towards domestic violence, by the difficulties of proving criminal misconduct, or by the lack of manpower to enforce protective orders. The repetition of the cycle over a period of months or years and a concomitant inability to find protection or escape from the abuser ultimately produces in the abused a state of "learned helplessness." In this state, the abused's options may seem limited to enduring a continuing and increasingly lethal escalation of the cycle of abuse, to strike back, or to commit suicide.

When an abused person caught up in such a cycle experiences an "episode of rebelliousness" or a "sporadic fighting back," the murder or attempted murder of the abuser may result, as in the case of *United States v. Whitetail*.[12] In addition, the state of learned helplessness may disable the abused from resisting the orders of the abuser to commit criminal acts, or from leaving the abuser when the abuser himself[13] commits criminal acts.

Uses of BPE

Generally

The BPE proponent must clear three evidentiary hurdles to admit BPE at trial:[14]

> (1) The evidence must be helpful under Rule 702;[15]
>
> (2) The evidence must be relevant under Rule 401; and
>
> (3) The probative value of the evidence must outweigh the danger of undue prejudice, confusion, or waste of time as required by Rule 403.[16]

---

[11] This description distills the essence of BPE and the BPS as set forth, with a great deal of consistency, in the cases and in the law reviews. For more detail on this subject, *see e.g.*, Tourlakis v. Morris, 738 F. Supp. 1128 (S.D. Ohio 1990); C. Gillespie, *Justifiable Homicide: Battered Women*, SELF-DEFENSE AND THE LAW (1989). The exposition of BPS/BPE theory herein does not necessarily represent the author's views on the subject.

[12] 956 F.2d 857, 862 (8th Cir. 1992). Ms. Whitetail, who stabbed her boyfriend during an argument, had quite a history of such episodes. *See infra* note 52.

[13] Masculine or feminine pronouns refer to both men and women.

[14] Admission at trial, however, is not always required. As the case of the killing of John M. Sharpe of Louisa County, Virginia, on 6 September 1992, demonstrates, the mere existence of BPE may assist the accused in avoiding trial completely. Ms. Bonnie Jo Hicks-Sharpe shot and killed her husband while he was sitting on the couch in the couple's residence. At the time of the shooting, Mr. Sharpe apparently was not threatening Ms. Hicks-Sharpe, however, Mr. Sharpe did have a "history of domestic violence." The Commonwealth's Attorney accepted a plea of guilty to voluntary manslaughter with a recommended sentence of ten years confinement with nine years suspended. Although finding the bargain "very lenient," Louisa County Circuit Court Judge F. Ward Harkrader approved the recommendation. As a first offender, Ms. Hicks-Sharpe actually will serve four months confinement. As part of the plea bargain, however, Ms. Hicks-Sharpe will not receive the proceeds of Mr. Sharpe's life insurance. *Sharpe to Serve Four Months*, CHARLOTTESVILLE DAILY PROGRESS, Feb. 4, 1993, at A1.

[15] The term "Rule" denotes the numerically designated federal and military rules of evidence. The provisions of the military and federal rules are presumed identical except as otherwise noted in this article.

[16] United States v. Suarez, 32 M.J. 767, 769 (A.C.M.R. 1991).

Qualification of BPE as "Expert" Evidence Under Rule 702

Civilian Courts

On the issues of whether BPE is based on data or theory "reasonably relied upon by experts in the particular field" as required by Rule 703,[17] or whether BPE may "assist the trier of fact to understand the evidence or to determine a fact in issue" as required by Rule 702,[18] the war is over—the proponents have won.[19]

Initial reluctance to admit BPE at trial was based on the perception that BPE and the BPS were not matters beyond the ken of ordinary factfinders, and on the novelty of the social science supporting BPS experts.[20] By 1979, however, the weight of scholarly writings on the subject of the BPS gave BPE its first big break. In *Ibn-Tamas v. United States*,[21] a District of Columbia court found that BPE contradicted widely believed "myths" concerning battered women—that is, that they liked being beaten or that they easily could leave their battering mates. The court further opined that BPE was supported by adequate social science to permit admission into evidence. Since *Ibn-Tamas*, the floodgates have opened and objections to BPE based on scientific reliability virtually have been swept away.[22]

The first[23] federal appellate case to consider the admission of BPE under Rule 702 was *Arcoren v. United States*.[24] In *Arcoren*, the prosecution offered BPE. Ms. Brave Bird, the rape victim and a key government witness, recanted her grand jury testimony at trial. The prosecutor had evidence that Ms. Bird had been in a lengthy battering relationship with the defendant, and offered this evidence along with expert testimony on the BPS to alleviate the jury's apparent puzzlement regarding the complete about-face that Ms. Bird had made from the grand jury to trial. The court explained:

> [T]he syndrome is a psychological condition which leads a female victim of physical abuse to accept her beatings because she believes that she is responsible for them, and hopes that by accepting one more beating, the pattern will stop. [The expert's] testimony provided the jury with information that would help it to determine which of Brave Bird's testimony to credit. If the jury concluded that Brave Bird suffered from battered woman syndrome, that would explain her change in testimony—her unwillingness to say something damaging against her husband.[25]

Mr. Arcoren did not contest the reliability or general admissibility of the BPE as expert evidence offered by the prosecution. He objected instead to its use by the prosecution, arguing—without apparently citing any authority—that use of BPE should be limited to self-defense cases.[26] The court not only rejected the defendant's proposed limitation on the use of BPE,[27] but also gratuitously certified BPE as helpful to the factfinder and, therefore, admissible under Rule 702.[28]

---

[17] FED. R. EVID. 703; MANUAL FOR COURTS-MARTIAL, United States, MIL. R. EVID. 703 (1984) [hereinafter MCM].

[18] FED. R. EVID. 702; MCM, *supra* note 17, MIL. R. EVID. 702.

[19] The discussion assumes that the defendant can lay other foundational requirements, such as the predicate circumstances of the BPS at the time of the charged offenses. Without such a foundation, even the most compelling BPE should be excluded. *See, e.g.*, Pruitt v. State, 296 S.E.2d 795 (Ga. 1982); United States v. Moore, 15 M.J. 354 (C.M.A. 1983).

[20] *See, e.g.*, Dyas v. United States, 376 A.2d 827 (D.C. 1977). The *Dyas* test involved three elements: (1) Was the BPE so distinctively related to some science as to be beyond the ken of the average layman?; (2) Did the expert have sufficient knowledge and experience in the field to assist the factfinder?; and (3) Was the science underlying BPE sufficiently developed to permit the expert to assert a reasonable opinion based on it?

[21] 407 A.2d 626 (D.C. 1979).

[22] *See, e.g.*, State v. Hanson, 793 P.2d 1001 (Wash. Ct. App. 1990); State v. Kelly, 478 A.2d 364 (N.J. Ct. App. 1984); State v. Koss, 551 N.E.2d 970 (Ohio 1990) (overruling State v. Thomas, 423 N.E.2d 137 (Ohio 1981), which held that the state of the science underlying BPE was not developed sufficiently to be admitted as expert testimony)).

[23] "Apparently this is the first federal appellate case to consider the admissibility under Rule 702 of evidence relating to the battered woman syndrome." Arcoren v. United States, 929 F.2d 1235, 1240 (8th Cir. 1992).

[24] *Id.* at 1235.

[25] *Id.* at 1240.

[26] *Id.* at 1241.

[27] *Id.* "It would seem anomalous to allow a battered woman, where she is a criminal defendant, to offer this type of expert testimony in order to help the jury understand the actions she took, yet deny her that same opportunity when she is the complaining witness and/or victim and her abuser is the criminal defendant." The court's analysis, however, does not address the obvious differences in the very situations it finds anomalous. A criminal defendant, facing loss of life or liberty, has a far greater stake in the outcome of a criminal case than does a victim or complaining witness and, in these cases, the prosecution, not the victim, offers the BPE. The victim, by changing her story, wants the exact opposite—she wants the jury to believe her testimony at trial, not her grand jury testimony.

[28] *Id.* "In the unusual circumstances of this case, the district court did not abuse its discretion in admitting [the expert's] testimony regarding battered woman syndrome." The court's lukewarm and limited endorsement of BPE as quoted above is at odds with the tone of its discussion, which was more enthusiastic. In the author's opinion, this hedging simply was the result of this case being the first appellate case to consider BPE.

Military Courts

Although no reported military cases involving BPE exist,[29] military courts likely will follow the more than twenty states[30] and the Eighth Circuit in admitting BPE for one purpose or another. First, given the relationship between the military and federal rules of evidence,[31] the Eighth Circuit's opinion carries significant weight. Second, the military rules were not intended to limit expert testimony to those areas totally beyond the ken of the members, or to such evidence as is absolutely necessary to the factfinder.[32] Third, the accumulation, over the past twenty years, of a great body of scholarly work on BPS likely will overwhelm reliability based opposition to BPE, at least for the accused. Finally—at least when offered by the accused—Fifth and Sixth Amendment concerns for due process and a fair trial will favor acceptance.[33]

Military courts, like their civilian counterparts, have in recent years confronted a wide array of "expert" testimony proffered by one party or another. Consistent with the purported intent of Rule 702, the primary rule dealing with the admissibility of expert testimony in military cases,[34] much of such evidence has been admitted. In *United States v. Jackson*,[35] the Army Court of Military Review (ACMR) reversed the trial judge's exclusion of defense-proffered expert testimony of a nurse's aid with eighteen years experience in treating child sex abuse victims. In *United States v. Jones*,[36] the United States Court of Military Appeals (COMA) approved the admission of testimony proffered against the accused, of a social worker who was not even a trained mental health professional. The witness testified as to how the retarded victim might have reacted under the circumstances of the case. Recently the COMA, in *United States v. Rhea*,[37] approved the use of expert testimony on the topic of parental duress in incest cases.

The watershed ruling on this issue, however, is the 1991 case of *United States v. Suarez*,[38] in which the ACMR approved the admission of "Child Sexual Abuse Accommodation Syndrome" (CSAAS) evidence against an accused charged with indecent assault on his adopted daughters. The CSAAS has several features in common with BPS, including an explanation for why victims recant,[39] why victims do not report the abuse, and why victims come to feel helpless.[40]

In evaluating the reliability of the CSAAS for Rule 702 purposes, the ACMR first noted the change in the law wrought by Rule 702 on the *Frye* test.[41] The court noted further that CSAAS evidence had been accepted in those states having adopted rules similar to the *Federal Rules of Evidence*.[42] The *Suarez* precedent bodes well for BPE. In addition to the common features of the two syndromes, the CSAAS was only seven to eight years old at the time.[43] The BPS's history and social science underpinnings compare favorably to those of the CSAAS, consisting of more than two decades of scholarship.[44] Although limits exist on what the

---

[29] This statement is based on WESTLAW and LEXIS searches of the respective military case law databases (MJ and MILTRY), that yielded no cases in which BPE figured in the holding.

[30] Tourlakis v. Morris, 738 F. Supp. 1128, 1133 (S.D. Ohio 1990). California, New York, New Jersey, Florida, and Texas are among the states observing the trend towards admitting BPE.

[31] MCM, *supra* note 17, MIL. R. EVID. 101(b)(1).

[32] *Id.* MIL. R. EVID. 702 (editorial cmt, introduction).

[33] *See* Rock v. Arkansas, 483 U.S. 44 (1987).

[34] United States v. Suarez, 32 M.J. 767 (A.C.M.R. 1991).

[35] 22 M.J. 604 (A.C.M.R. 1986).

[36] 26 M.J. 197 (C.M.A. 1988).

[37] 33 M.J. 413 (C.M.A. 1991).

[38] *Suarez*, 32 M.J. at 767, *aff'd*, 35 M.J. 374 (C.M.A. 1992).

[39] United States v. Whitetail, 956 F.2d 857 (8th Cir. 1992).

[40] *Suarez*, 32 M.J. at 767, 768.

[41] *See* Frye v. United States, 293 F. 1013 (D.C. Cir. 1923) (Scientific evidence must have advanced to general acceptance in the scientific community).

[42] *Suarez*, 32 M.J. at 767, 770.

[43] The origin of the CSAAS may be traced to 1983, when Dr. Roland Summit published *The Child Sexual Abuse Accommodation Syndrome*, 7 INT'L. J. OF CHILD ABUSE AND NEGLECT 177 (1983).

[44] Andersen & Read-Andersen, *supra* note 7, at 366 n.18.

military courts will accept by way of novel or unproven "scientific" theories and the experts who champion them,[45] the military courts apparently would accept BPE if called on to do so.

Relevance of BPE to Trial Issues

Generally

Overcoming the evidentiary hurdles posed by Rule 702, however, does not insure that BPE, or any other expert evidence, will be admitted. Rule 402 requires that such evidence must be relevant.[46] Under Rule 401, evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."[47] The rule of relevancy requires a logical relationship between the facts proven by the evidence and an actual disputed issue at trial. If, for instance, an accused could prove that she was afflicted by BPS but she instead chose to defend a charge of murder by proving an alibi, even the most persuasive experts and compelling anecdotal evidence could not make such evidence relevant. The existence of a logical relationship between BPE and a defense or other material issue will be a hurdle that the proponent must overcome. The ensuing discussion will focus on three areas where relevancy issues likely will arise in the use of BPE: traditional self-defense, nontraditional self-defense, and duress or coercion.

Traditional Self-Defense[48]*—Civilian Courts*

In *United States v. Whitetail*,[49] the district court admitted expert and lay BPE proffered by the defendant. Emrolyn Kae Whitetail stabbed her longtime live-in lover, Robert McKay, with a butcher knife in the lower right side of his back at six a.m. on 5 September 1990. The couple had been up all night drinking and arguing at their home on Devil's Lake Indian Reservation, Fort Totten, North Dakota. Ms. Whitetail told police she stabbed Mr. McKay because she was afraid that he was going to beat her up.[50] The district court in admitting the BPE, however, also permitted the prosecution to offer, over defense objection grounded on Rule 404,[51] rebuttal evidence of uncharged misconduct that portrayed the defendant herself as a very violent woman.[52] The Eighth Circuit Court of Appeals affirmed Ms. Whitetail's conviction, rejecting her argument that the district court erred in admitting the prosecution's BPE rebuttal.[53] It glossed over without comment, and therefore arguably implicitly approved, the defendant's use of BPE in its case-in-chief.

In *Tourlakis v. Morris*,[54] a habeas corpus case, the defendant, Andrea Tourlakis, claimed that the state trial court violated her Fifth and Sixth Amendment[55] rights to due process and a fair trial by excluding BPE in her trial for the attempted murder of, and felonious assault on, her lover.[56] The defendant testified that on the day of the first of two shootings, the victim, following an argument, "tore my whole body up . . . slammed me around, beat me up, my arms were totally bleed-

---

[45] *See, e.g.*, United States v. Rivera, 26 M.J. 638 (A.C.M.R. 1988), *pet. denied* 27 M.J. 459 (C.M.A. 1988). In *Rivera*, the ACMR held that the military judge erred when he admitted, over defense objection, testimony from a clinical psychologist on the "therapist patient-sex syndrome" (TPSS). Like the CSAAS, the TPSS shares features with the BPS. The court, however, found that the TPSS was "novel," having been in existence for approximately one year. *Id.* at 641. The court opined that, based on the dearth of scholarly work on the subject, "[i]t appears that both the validity of the underlying scientific principles and the technique for applying those principles are very much open to question in the scientific community at this point in time." *Id.* at 642.

[46] MCM, *supra* note 17, MIL. R. EVID. 402.

[47] *Id.* MIL. R. EVID. 401.

[48] The term "traditional self-defense," for purposes of this article, refers to the situation where the accused and the victim are conscious of each other's presence and where the victim is alleged to be menacing the accused in real time.

[49] 956 F.2d 857 (8th Cir. 1992).

[50] *Id.* at 859. Forensic evidence disclosed, however, that the knife had been removed and thrust back into the body. *Id.*

[51] FED. R. EVID. 404.

[52] Defendant had threatened McKay with a knife one month prior to the killing, had threatened to kill McKay with a knife several days prior to the killing, had fist fights with her sisters, kicking one of them in the eye, and had punched a social worker in the mouth. Further, the prosecution offered evidence to show that defendant was chemically dependent and that she had a reputation for violence when intoxicated. *Whitetail*, 956 F.2d at 859-61.

[53] *Id.* at 861. The Whitetail case identifies a pitfall for the proponent of BPE when the defendant has a history of violent misconduct in her own right. Although rebuttal evidence will be limited by Rule 403, when the defendant has placed prior violence in issue, the prosecution will be given great latitude in rebutting BPE, especially in homicide cases.

[54] 738 F. Supp. 1128 (S.D. Ohio 1990).

[55] U.S. CONST. amends. V and VI.

[56] Battered person evidence at the time of the trial—May 1985—was inadmissible under Ohio state law. State v. Thomas, 423 N.E.2d 137 (1981). Battered person evidence now is admissible in Ohio. State v. Koss, 551 N.E.2d 970 (1990).

ing."[57] On the day of the shooting underlying the attempted murder charge, the defendant testified that the victim was enraged at her expressed desire to end their relationship, and that she shot the victim as he stepped toward her. She admitted that after the victim threw a clothes basket at her, she shot him two more times and chased him from her house, firing at him even as he entered an ambulance.[58]

The district court rejected Ms. Tourlakis's constitutional claims and denied her habeas corpus petition. The district court found that the state court grounds for denying admission of BPE at the time of her trial—irrelevance, undue prejudice and confusion, unreliability, and invasion of the jury's factfinding province—[59]were sufficiently compelling to preclude the conclusion that Ohio's former rule was unconstitutional.[60] The other two federal cases considering constitutional challenges to state exclusions of BPE also have deferred to the states.[61] Federal deference to state court exclusions of BPE, however, soon may be a moot issue, as a growing number of states admit BPE in support of a traditional self-defense defense.[62] Based on available precedent, however, should the military courts choose to exclude BPE for some or all of the reasons posited by *State v. Thomas*,[63] the author believes the federal courts will defer.

Traditional Self-Defense—Military Courts

Self-defense in the military has an objective and a subjective element. The former requires that the accused have a reasonable belief in impending harm, and the latter requires that the accused honestly believe that the force used is necessary to protect himself.[64]

Battered person evidence will have limited relevance to the objective element of self-defense. Battered person evidence focuses on the accused's subjective state of mind, emphasizing that, because of the BPS which the abuser has fostered, the battered accused is not necessarily a reasonable prudent person when dealing with the victim. Battered person evidence closely relates to the state of the accused's emotional stability which—as the discussion to R.C.M. 916(e)(1) indicates—is irrelevant to this element of self-defense.[65]

Authority, however, exists for admitting BPE on the objective element of self-defense. While the *Military Judge's*

---

[57] *Tourlakis*, 738 F. Supp. at 1130.

[58] *Id.* at 1131.

[59] *Id.* at 1138.

[60] *Id.* at 1140.

[61] Fennell v. Goolsby, 630 F. Supp. 451 (E.D. Pa. 1985); Thomas v. Arn, 728 F.2d 813 (6th Cir. 1984), *aff'd*, 106 S. Ct. 466 (1985).

[62] *Tourlakis*, 738 F. Supp. at 1133 (discussing trend in accepting BPE).

[63] 423 N.E.2d 137 (1981) (basis for ruling in *Tourlakis*).

[64] MCM, *supra* note 17, R.C.M. 916(e)(1) states the following:

> (e) *Self-defense.*
>
> *(1) *Homicide or assault cases involving deadly force.* It is a defense to a homicide, assault involving deadly force, or battery involving deadly force that the accused:
>
> (A) Apprehended, on reasonable grounds, that death or grievous bodily harm was about to be inflicted wrongfully upon the accused; and
>
> (B) Believed that the force the accused used was necessary for protection against death or grievous bodily harm.
>
> Discussion
>
> *The words "involving deadly force" describe the factual circumstances of the case, not specific assault offenses. If the accused is charged with simple assault, battery or any form of aggravated assault, or if simple assault, battery or any form of aggravated assault is in issue as a lesser included offense, the accused may rely on this subsection if the test specified in subsections (A) and (B) is satisfied.
>
> The test for the first element of self defense is objective. Thus, the accused's apprehension of death or grievous bodily harm must have been one which a reasonable, prudent person would have held under the circumstances. Because this test is objective, such matters as intoxication or emotional instability of the accused are irrelevant. On the other hand, such matters as the relative height, weight, and general build of the accused and the alleged victim, and the possibility of safe retreat are ordinarily among the circumstances which should be considered in determining the reasonableness of the apprehension of death or grievous bodily harm.
>
> The test for the second element is entirely subjective. The accused is not objectively limited to the use of reasonable force. Accordingly, such matters as the accused's emotional control, education, and intelligence are relevant in determining the accused's actual belief as to the force necessary to repel the attack.

[65] *Id.* (discussion).

Benchbook instruction on self-defense uses the standard of the "ordinary prudent adult person,"[66] the first note to the instruction requires qualification of the standard if a special factor is present—such as, the sex of the accused or that the accused lacks the intelligence to act as a normal prudent adult person—affecting the reasonableness of the apprehension.[67] In the appropriate case, with a well-qualified and articulate expert, an accused could force the court-martial to consider BPE on the objective element of self-defense. The counter argument is that going too far beyond those factors listed in the first note to the instruction would negate the stated intent of Rule for Court-Martial 916(e)(1)(A) to require an objective standard.

An accused presumably will fare better proffering BPE on the subjective element of self-defense, when her state of emotional control may well be relevant.[68] By describing the state of "learned helplessness" fostered by the BPS, BPE could explain how an accused could believe that escape was impracticable and the use of deadly force was warranted in situations in which the reasonable prudent person would flee or select a less lethal deterrent.

Regardless of the self-defense element for which BPE is proffered, the author submits that because of the familiarity of traditional self-defense, courts will find a way to admit it, especially if the BPE constitutes the entirety of the accused's defense case.

Nontraditional Self-Defense—Civilian Courts

Civilian court opinions have been mixed on the issues of admitting BPE and instructing on self-defense in cases when the victims were not actually threatening the defendants at the time of the killings or assaults. These cases have concentrated on the remoteness or proximity in time between the perceived threat against which the privilege of self-defense was exercised, and the killing or assault by the defendant. California and Washington are among the states that admit and instruct on self-defense when BPE is the basis for a nontraditional self-defense.[69] Other states, such as Maryland and Missouri, have excluded BPE in these cases, especially when the defendant's claims appear improbable.[70]

Because of the differences between the military and civilian defenses of self-defense, analyzing state and federal cases on this issue would not be helpful to the military practitioner. What would be beneficial, however, is determining what deference, if any, that the federal courts will pay to state and military requirements for temporal proximity between the threat and the response, in habeas corpus petitions, when such requirements effectively foreclose a defendant from advancing a defense. The *Tourlakis*[71] case provides some evidence, in general, of deference in BPE cases.

In *Whipple v. Duckworth*,[72] however, the Seventh Circuit Court of Appeals squarely focused on the temporal proximity issue. The defendant, a seventeen-year-old boy, killed his allegedly abusive parents by first luring his mother to the garage of the family home, where he decapitated her. He then went to his parents' bedroom where he did the same to his sleeping father. The trial court refused to instruct on self-defense and defense of others, and the Indiana Supreme Court held the threat of harm to the defendant and his sister too temporally remote to qualify as "imminent" under Indiana law.[73] The federal court in *Whipple v. Duckworth* upheld the state's interpretation of its defense of self-defense. Finding that the state court had not "interpreted its statute in a novel or unnatural fashion,"[74] the Seventh Circuit Court of Appeals sanctioned divergent state views of temporal proximity in self-defense cases, stating,

> [T]his court has no authority to tell the Indiana Supreme Court how to construe Indiana statutes. Interpretation of the word imminent is a matter of state law that must be decided by state courts and legislatures. . . . Divergent state court interpretations of identical state self-defense statutes comports with general principles of federalism.[75]

---

[66] DEP'T OF ARMY, PAMPHLET 27-9, MILITARY JUDGES' BENCHBOOK, para. 5-2 (1 May 1982) (C3 15 Feb. 1989) [hereinafter BENCHBOOK].

[67] *Id.* note 1. This note states the following:

> The ordinary objective standard used to determine whether apprehension of serious bodily harm or death was reasonable must be qualified if there is evidence of a special factor affecting the reasonableness of the apprehension (i.e., sex of the accused, or if the accused is a person lacking sufficient intelligence to act as a normal prudent adult person. The requirement of reasonableness should be determined in light of these special factors).

[68] *Id.*

[69] *See* State v. Allery, 682 P.2d 312 (Wash. 1984) (victim prone on couch at time of shooting); People v. Aris, 264 Cal. Rptr. 167 (Cal. Ct. App. 1989) (victim shot five times in his sleep; error to exclude BPE as to subjective element of self-defense; properly excluded on objective element).

[70] *See* Boyd v. State, 581 A.2d 1 (Md. 1990) (defendant paid another to blow up husband in his car); State v. Martin, 666 S.W.2d 895 (Mo. Ct. App. 1984).

[71] Tourlakis v. Morris, 738 F. Supp. 1128 (S.D. Ohio 1990).

[72] 957 F.2d 418 (7th Cir. 1992).

[73] Whipple v. State, 523 N.E.2d 1363 (Ind. 1988).

[74] *Whipple*, 957 F.2d at 423.

[75] *Id.* at 422.

Nontraditional Self-Defense—Military Courts

The author assumes, based on the *Whipple* precedent and for the sake of argument, that the federal courts will defer to military court interpretations of the temporal proximity issue based on the separation of powers, in much the same way in which they defer to the states based on federalism. The task then, is to determine what the military law provides. The operative language on temporal proximity of Rule for Court-Martial 916(e)(1)(A) is "about to be inflicted."[76] Apparently no military cases construing this phrase exist. By comparing "about to be" with the term "immediately" in the duress defense,[77] however, an educated case can be made as to its meaning.

The discussion to Rule for Court-Martial 916(h) (the duress defense) explicitly gives the term "immediately" a flexible, rather than absolute, meaning[78] by contrast with its strict dictionary definition.[79] It permits immediacy to "vary with the circumstances."[80] In comparing "immediately" in the duress context to "about to be" in the self-defense context, two points favor a strict interpretation of the phrase "about to be." First, the *Manual for Courts-Martial* (*Manual*) could have used the term "immediately" for self-defense if it had wished for the concept to share the flexibility in temporal proximity afforded to the accused arguing duress. Secondly, the discussion of self-defense does not qualify the phrase "about to be" as did the discussion of duress. The *Manual* drafters showed that they knew how to qualify a term which appears absolute on its face, but did not do so with self-defense. The author believes that the *Manual* did not omit such qualification by accident. The difference between duress and self-defense on this issue exists because self-defense can apply to homicide cases, whereas duress cannot.

The author further believes that, because of the different terminology between self-defense and duress, in the absence of evidence that the threat and the response were tightly linked in time, BPE will not be relevant to nontraditional self-defense in military cases under existing law.

Duress and Coercion

Civilian Courts

Like the military courts, the federal courts apply a duress defense in which the word describing the temporal proximity between the threatened harm and the criminal act sought to be excused is "immediate."[81] The federal courts have admitted BPE to support a duress defense in cases where the threat of harm was not immediate in the strict sense, although defendants have not enjoyed uniform success in convincing juries to acquit them.

In *United States v. Simpson,*[82] the defendant, an allegedly battered woman, drove her boyfriend to a bank knowing that he intended to rob it, drove him from the bank to a motel following the robbery, picked him up the next day from his motel, and received $4000 in proceeds from the robbery as a purported sixty-forty split. Ms. Simpson proffered BPE through lay and expert witnesses, arguing the repeated beatings that she had received from her boyfriend-robber over the course of their relationship, plus a threat to kill her or her parents, prevented her from being able to discern potential avenues of escape that might have seemed viable to a normal reasonable person. She also argued that, under the circumstances, she had no reasonable means of escape. The judge admitted the BPE, in spite of the absence of an immediate

---

[76] MCM, *supra* note 17, R.C.M. 916(e)(1)(A).

[77] *Id.* R.C.M. 916(h) states the following:

> (h) *Coercion or Duress.* It is a defense to any offense except killing an innocent person that the accused's participation in the offense was caused by a reasonable apprehension that the accused or another innocent person would be immediately killed or would immediately suffer serious bodily injury if the accused did not commit the act. The apprehension must reasonably continue throughout the commission of the act. If the accused has any reasonable opportunity to avoid committing the act without subjecting the accused or another innocent person to the harm threatened, this defense shall not apply.
>
> Discussion
>
> The immediacy of the harm necessary may vary with the circumstances. For example, a threat to kill a person's wife the next day may be immediate if the person has no opportunity to contact law enforcement officials or otherwise protect the intended victim or avoid committing the offense before then.

[78] MCM, *supra* note 17, R.C.M. 916(h) (discussion).

[79] BLACK'S LAW DICTIONARY 675 (5th ed. 1979), defines "immediately" as, "Without interval of time, without delay, straightaway, or without any delay or lapse of time. The words "immediately" and "forthwith" have the same meaning." They are stronger than the expression "within a reasonable time" and imply prompt, vigorous action without any delay.

[80] MCM, *supra* note 17, R.C.M. 916(h) (discussion).

[81] United States v. May, 727 F.2d 764, 765 (8th Cir. 1984) (quoting Shannon v. United States, 76 F.2d 490, 493 (10th Cir. 1935), "[I]mmediate and of such a nature as to induce a well-grounded apprehension of death or serious bodily injury if the act is not done."

[82] 979 F.2d 1282 (8th Cir. 1992).

threat,[83] and instructed the jury on duress. The jury, however, convicted Ms. Simpson as charged. The Ninth Circuit also has sanctioned the use of BPE in the duress context without a strictly immediate threat of harm.[84]

Even the Ninth Circuit, however, has it limits. In *United States v. Homick*,[85] the defendant, an allegedly battered woman, falsified an affidavit on the orders of her boyfriend. The orders to falsify the affidavit were delivered over the telephone and did not contain an explicit threat of harm to the defendant if not obeyed. Ms. Homick argued that, based on his battering behavior, her acquiescence to the order was simply an example of his complete domination over her and not a willing and voluntary act. The judge excluded the BPE, and the jury convicted Ms. Homick.[86] The court of appeals upheld the trial judge's exclusion of the BPE. In a ruling that apparently turned on the uniquely specious nature of the defense claim, the court held that duress was not available when there was nothing "implicitly or explicitly threatening about either conversation" in which defendant was ordered to commit the criminal acts.[87]

Military Courts

Consistent with the flexibility built into the duress defense in the *Manual,* courts-martial have entertained a variety of duress defenses in which the threatened harm was not strictly immediate. As with the federal courts, accuseds have an uneven record of convincing the factfinder when the evidence discloses that the threatened harm was too remote from the criminal act. Like the federal courts, military courts have had their limits.

The ACMR reached its limit in the 1970 case of *United States v. Pierce*.[88] Privates Pierce and Edwards escaped from the post stockade at Fort Ord, California. Each soldier had been tried and sentenced to confinement for absence without leave. At trial, defense counsel offered evidence of unlawful conditions of confinement at the stockade including overcrowding, beatings by guards, race riots, and racially motivated assaults by prisoners on other prisoners. Defense counsel, however, was unable to proffer evidence showing that on the exact date of the escapes, the soldiers were in any danger.[89] The military judge apparently was unimpressed and declined to instruct on duress. The ACMR was apparently similarly unimpressed and, applying a strict definition of "immediate," affirmed the findings, commenting that "the offer of proof, necessarily, is barren of any evidence that the accuseds at the material time, 21 January 1969, the day of the escape, were in any danger of being killed or suffering serious bodily injury."[90] This language indicates that the court expected the threat of harm to exist at least on the day of the escape. The result, however, can be viewed as flowing from the law of duress as it existed under the *1969 Manual for Courts-Martial,* which described the term "immediate" as "not of an injury in the future."[91] The current *Manual,* however, not only added the discussion language which lent flexibility to the concept of immediacy, but also deleted the phrase "not an injury of the future."[92]

In a 1976 case, *United States v. Jemmings*,[93] the COMA held that the military judge improperly accepted the guilty plea of an accused who claimed that his children would be harmed if he did not participate in a housebreaking. The COMA ruled that the accused's statements regarding his children raised duress as a defense even though the accused admitted that he did not believe that any harm would come to his children on the actual night of the housebreaking. The accused alleged, however, that he had attempted in vain to seek protection from his chain of command.

Under these circumstances, the COMA opined that it could "not be said that the accused's acknowledgment that his children would not be harmed 'that night' ended the threat of

---

[83] The court of appeals noted that the defendant was given "broad latitude" in presenting her duress defense using BPE, suggesting to the author that the court of appeals might not have granted such latitude. *Id.* at 1288.

[84] United States v. Johnson, et al., 956 F.2d 894 (9th Cir. 1992) (group of women subjected to extreme violence and threats of violence—BPE admitted as to all; jury could reject duress where defendant remained part of a drug ring for six months).

[85] 964 F.2d 899 (9th Cir. 1992).

[86] *Id.* at 905.

[87] *Id.* at 906.

[88] 42 C.M.R. 390 (A.C.M.R. 1970).

[89] *Id.* at 394.

[90] *Id.*

[91] MANUAL FOR COURTS-MARTIAL, United States, para. 216f (rev. ed. 1969) [hereinafter 1969 MANUAL].

[92] See *supra* note 77.

[93] 1 M.J. 414 (C.M.A. 1976).

immediate grievous bodily harm to them."[94] An argument could be made that the fruitless attempt to seek official assistance in *Jemmings* distinguishes it from *Pierce*, and that the strict meaning of "immediate" survived. On the immediacy issue, however, the *Jemmings* court cited only a California case, *People v. Otis*,[95] as authority, and did not address *Pierce*,[96] or any other military case. Therefore, the COMA could be viewed as judicially legislating around a *Manual* provision it found too harsh.

Although the *1984 Manual* significantly changed the concept of "immediacy" in the duress defense, the appellate courts had to wait until 1992 to deal with the change. In March 1992, the ACMR considered the case of *United States v. Mitchell.*[97] Staff Sergeant Mitchell was alerted for deployment with his unit in support of Operation Desert Shield in December 1990. He requested and was granted three days leave to attend to family matters. While on leave, however, the accused learned that his wife was experiencing "severe mental problems" that would require extended treatment and possible hospitalization. The accused chose to remain with his wife. His unit deployed to Saudi Arabia without him on 23 December 1990.[98]

Mitchell was charged with desertion to avoid hazardous duty and pleaded guilty in accordance with a pretrial agreement. On appeal, Mitchell argued that the military judge should have rejected his plea of guilty because his statements regarding his wife's mental problem raised a matter inconsistent with guilt—that is, the defense of duress. The ACMR disagreed. Although its holding was not based on the lack of immediacy of the threatened harm to Mrs. Mitchell,[99] the ACMR found that, at the time he deserted, no present threat existed that Mrs. Mitchell would harm herself nor did the accused perceive one, and therefore the potential harm was not immediate.[100] Because Mitchell failed to take reasonable steps to avoid the perceived threat before choosing desertion, this provided a basis for the holding against him.[101]

The interrelationship of immediacy and the accused's attempts to seek lawful solutions to the problems alleged to have created the duress, extends throughout this line of cases.[102] As a result, military courts seem to be willing to help those who help themselves lawfully, before resorting to criminal behavior.

In *United States v. Rankins*,[103] the COMA reached a similar conclusion. Specialist (SPC) Rankins's husband, also a soldier, had a heart problem involving atrial fibrillation that necessitated his hospitalization on one occasion while she was in the field. She was inordinately distressed about leaving her husband to go to the field in the wake of his hospitalization.[104] Even though her husband ultimately was cleared for physical training and eventually deployed with his unit to Saudi Arabia, SPC Rankins chose to miss the movement of her unit to the field for an exercise.

Charged with missing movement, SPC Rankins pleaded not guilty and offered evidence to show that she missed move-

---

[94] *Id.* at 418.

[95] 344 P.2d 342 (1959). The *Otis* case stands for the proposition that "[t]he immediacy element of the (duress) defense is designed to encourage individuals promptly to report threats rather than breaking the law themselves." *Jemmings,* 1 M.J. at 418. Six years later, the Navy-Marine Corps Court of Military Review (NMCMR), in the case of United States v. Sutek, 14 M.J. 671 (N.M.C.M.R. 1982), followed, without explicitly acknowledging, the reasoning in *Jemmings.* The accused, a female seamen embarked on a vessel, deserted rather than face further "initiation" at the hands of her shipmates, after complaining, in vain, to her chain of command about prior assaults in the name of initiation. In 1990, the NMCMR revisited the issue in the case of United States v. Riofredo, 30 M.J. 1251 (N.M.C.M.R. 1990) *pet. denied,* 32 M.J. 39 (C.M.A. 1991), but held that duress was unavailable when, as in this case, the chain of command had taken some action, even if such action was not completely effective to protect the accused. *Id.* at 1253.

[96] United States v. Pierce, 42 C.M.R. 390 (A.C.M.R. 1970).

[97] 34 M.J. 970 (A.C.M.R. 1992).

[98] *Id.* at 972.

[99] The ACMR held that to raise the defense of duress, the threatened harm would have to originate from the unlawful action of a third party, which was not present in the accused's case. *Id.* at 973. This requirement would not trouble an accused proffering BPE of course, since the battering behavior would at least be alleged to be unlawful.

[100] *Id.* at 974.

[101] "It was also unreasonable for him to conclude that he could not take action to ensure that she had proper care at any time while he was absent. In addition, he was given the opportunity to pursue other avenues of assistance to alleviate the problem with his wife." *Id.*

[102] *See supra* note 95. In United States v. Hullums, 15 M.J. 261 (C.M.A. 1983), the COMA noted unrebutted evidence that "no action was taken [by the chain of command] against the persons that had threatened [the accused's] life. Furthermore, in United States v. Pierce, 42 C.M.R. 390 (C.M.A. 1970), where the COMA declined to grant relief, the accuseds apparently did not attempt to bring their problems to the attention of those who could remedy them, relying instead on the presumption that "the confinement officers should have known about them." *Id.* at 392.

[103] 34 M.J. 326 (C.M.A. 1992).

[104] "[A]ppellant learned that the wife of a soldier had died of a heart attack while the soldier was in the field. Appellant was told that the soldier's wife had been dead for two days and her baby was dehydrated when finally discovered." *Id.* at 327.

ment because of the duress produced by her husband's heart problem and her fear of being absent when he needed her help.[105] The military judge ruled that the evidence did not raise the duress defense and refused to instruct on it. The ACMR[106] and the COMA agreed. The COMA held that in order to raise duress, the threatened harm must originate from the wrongful action of a third person, not, as in SPC Rankins' case, the innocent action or condition of the person to be protected. More importantly, the COMA found any threatened harm not to be immediate, and the idea of immediacy was directly tied to the efforts—or rather the lack thereof—on the part of the accused to avoid the harm by lawful means. The court stated,

> Further, and related to the immediacy part of the defense, there is no evidence that appellant tried to avoid committing the offense. Even if her husband was at risk of suffering a heart attack at some future date, the risk . . . could be minimized by his wearing one of the electronic alert devices readily available on the open market.[107]

The implications for the proponent of BPE in a duress case are clear: (1) although under the *Manual* the threatened harm need not be immediate in the strict dictionary sense, it must be a real, not fanciful threat, as in *Rankins;* and (2) the accused must take steps to avoid the threatened harm in a lawful manner.

The ability to demonstrate that more than a fanciful threat exists when the accused can prove that the batterer has assaulted her in the relatively recent past and has the opportunity and continued inclination to do so in the not too distant future. The steps taken to avoid the threatened harm need not be effective.[108] They typically will consist of fruitless reports of assaults to law enforcement authorities or the chain of command, or a demonstrated indifference of the batterer to the deterrent of criminal sanctions or court orders.

Recent cases involving duress have admitted similar evidence. In *United States v. Hullum,*[109] the COMA sanctioned the admission of evidence of racial discrimination when coupled with threats of violence. In *United States v. Roberts,*[110] sexual harassment, along with a shipboard "initiation" assault, was admitted in a duress defense case. The author perceives a trend toward admitting evidence in duress cases when threats are motivated by racial or sexual animus. Battered person evidence—especially when proffered by a woman—arguably would fit in with this trend. In the "post-Tailhook" era, this trend, in the author's view, is likely to gain, rather than lose, momentum.

Conclusion and Recommendations

Over the last fifteen years, BPE has gained acceptance by many civilian courts as reasonably reliable evidence relevant to a variety of issues in criminal trials, most notably in the areas of self-defense and duress. Courts have been hesitant, however, to admit BPE in homicide cases when the victim was not actually threatening harm to the defendant at the time of the charged offense. Federal courts reviewing state court decisions excluding or limiting the use of BPE have deferred to state evidentiary rules and interpretations.

Battered person evidence admissibility has not been litigated in a reported military case. Reason exists, however, to believe that military courts will respond to offers of BPE into evidence in much the same way as the civilian courts have responded, and that federal courts will defer to reasonable military rulings on BPE issues. Military counsel ultimately will offer BPE for a variety of purposes, including not only self-defense and duress, but also as extenuation and mitigation evidence on sentencing.[111]

---

[105] The accused testified that, "I felt that my husband was going to have a heart attack and I wouldn't be there to help him or even to save his life." *Id.* at 328. Evidence also existed that the accused had mixed motives for missing movement. She had communicated to her chaplain a general distaste for the hardships associated with going to the field and when questioned about why she did not want to go to the field, she simply replied that, "I just don't want to go." *Id.*

[106] United States v. Rankins, 32 M.J. 971 (A.C.M.R. 1991).

[107] United States v. Rankins, 34 M.J. 326, 330 (C.M.A. 1992).

[108] The Navy-Marine Corps Court of Military Review (NMCMR) took the rule requiring first resort to lawful solutions one logical step further in United States v. Riofredo, 30 M.J. 1251 (N.M.C.M.R. 1990), *pet. denied,* 32 M.J. 39 (C.M.A. 1991). In *Riofredo,* the accused had sought the assistance of his chain of command following each of two assaults by a fellow marine, one of which was serious enough to break his teeth. The efforts of his commander were feeble and ineffective—the guilty party was counselled in writing but was undeterred and continued to threaten Riofredo with bodily harm. The accused lost hope and went absent without leave for nearly eight and one-half months. The NMCMR held that the defense of duress was not available where the authorities take any action—even one that might arguably be deemed wholly ineffective—and distinguished the case from United States v. Roberts, 14 M.J. 671 (N.M.C.M.R. 1982), where the accused's chain of command took no action. The COMA has not addressed the propriety of the *Riofredo* gloss on the rule.

[109] 15 M.J. 261 (C.M.A. 1983).

[110] 14 M.J. 671 (N.M.C.M.R. 1982).

[111] In the area of sentencing, at least, the relevance of BPE appears to be certain. Rule for Courts-Martial 1001(c)(1)(A) lists as matters in extenuation "those reasons for committing the offense which do not constitute a legal justification or excuse." MCM, *supra* note 17, R.C.M. 1001(c)(1)(A). Accordingly, the military courts are unlikely to fall into the trap of several federal trial judges who mistakenly believed that defendants offering BPE as a defense, but who nevertheless were convicted, could not request a downward departure in sentencing based on the imperfect, unsuccessful BPE-based defense. *See, e.g.,* United States v. Whitetail, 956 F.2d 857 (8th Cir. 1992); United States v. Johnson, 956 F.2d 894 (9th Cir. 1992).

Potential exists, however, for confusion and unnecessary litigation in duress cases because of the failure of the duress instruction of the *Military Judge's Benchbook* to take into account the changes in the concept of "immediacy" in the *Manual.* The present instruction, dated 1 May 1982, does not address "immediacy" explicitly, although it does discuss the circumstance of whether the accused reported the threat to the authorities.[112] This instruction is inadequate to address BPE, as well as other similar evidence, when the threatened harm is not proximate in time to the charged misconduct. Military judges who may be uncomfortable when dealing with novel evidence such as BPE, may create error by refusing to instruct the court on the law of immediacy in duress. The instruction should include the following language taken from R.C.M. 916(h) and its discussion:

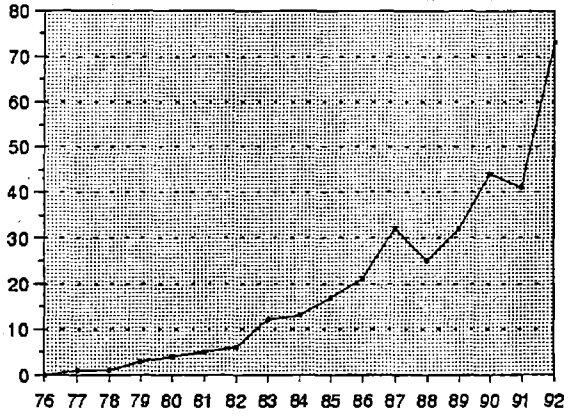
> The immediacy of the harm necessary may vary with the circumstances. For example, a threat to kill a person's wife the next day may be immediate if the person has no opportunity to contact law enforcement officials or otherwise protect the intended victim or avoid committing the offense before then.[113]

Potential for confusion and error also exists in the area of self-defense, where one has to divine the meaning of "about to be," the operative phrase dealing with temporal proximity in self-defense. An important matter such as this should not be left open to speculation and argument. The President should decide whether "about to be" means the same as "immediate" in the strict dictionary sense or whether it shares the more flexible meaning of "immediate" as in the duress context. The decision should then be codified in the rule itself, not in the discussion. The matter is simply too important to leave unresolved. On its resolution could hang the choice between a killer being brought to justice, or an accused getting away with what many would consider to be murder.

Appendix

Battered Person Evidence and the Courts

An Unscientific Index of Growing Interest, 1976-92



Lexis MEGA Database. Y axis values indicate number of cases mentioning BPE each year.

[112] BENCHBOOK, *supra* note 66, para. 5-5.

[113] MCM, *supra* note 17, R.C.M. 916(h) (discussion).

Article 31(b) Warnings Revisited: The COMA Does A Double Take

Major Jeffrey L. Caddell,
21st Theatre Army Area Command,
Hoensbroek, The Netherlands

Introduction

Can a social worker interview a military accused in a sex offense case and begin questioning without first providing Article 31(b) warnings? Can a civilian intelligence agent question a military espionage suspect without first providing Article 31(b) warnings? Are the confessions in each case admissible in a court-martial? Two recent decisions affirmatively answered these questions: *United States v. Moreno*[1] and *United States v. Lonetree.*[2] What are the specific tests

[1] 36 M.J. 107 (C.M.A. 1992).

[2] 35 M.J. 396 (C.M.A. 1992).

that the United States Court of Military Appeals (COMA) currently applies to situations of civilian questioners and how do they compare with previous decisions? An examination of the recent *Moreno* and *Lonetree* decisions should reveal what tests the courts currently employ to resolve the threshold question of who is subject to the Uniform Code of Military Justice (UCMJ or Code). These two recent COMA decisions will illustrate the present legal standards applicable in this area, and will provide the yardstick to measure previous decisions.

Significantly, this article will not provide a complete historical outline of Article 31(b), nor will it attempt to address the Sixth Amendment right to counsel issue or the issues of unlawful inducement or compulsion of statements.[3] In essence, this article critically will review two recent COMA decisions to discern the current test applied by the COMA in cases where civilians question service members.

In cases involving nonmilitary questioners, the COMA first addresses the threshold issue of whether the questioners are subject to the UCMJ[4] to determine whether Article 31(b) applies. *Moreno* and *Lonetree* analyzed this issue. If a person is not subject to the Code, the analysis stops and Article 31(b) rights do not apply. Article 31(b) provides the following:

> b) No person subject to this chapter may interrogate, or request any statement from an accused or a person suspected of an offense without first informing him of the nature of the accusation and advising him that he does not have to make any statement regarding the offense of which he is accused or suspected and that any statement made by him may be used as evidence against him in a trial by court-martial.[5]

Two initial key elements to Article 31(b) are: (1) Who must warn, and (2) When is a warning required? The first element—"who must warn"—arises whenever the persons conducting the questioning or interrogation are nonmilitary and, therefore, are not ordinarily subject to the UCMJ. The first element is a threshold question to decide whether or not Article 31(b) even applies. Thereafter, the COMA uses the present-day two-prong test, announced in *United States v. Duga*,[6] to resolve the second key element of Article 31(b). This article will focus on the first element of "who is subject to the Code."

Generally, if the questioners are not subject to the Code, the analysis stops and Article 31(b) rights do not apply.[7] One of the purposes behind Article 31(b) was to protect soldiers from the subtle pressures existing in the military that could force a soldier into responding to questions without considering his or her Fifth Amendment rights against self-incrimination.[8] Consequently, in cases where civilians ask the questions, the Article 31(b) protection does *not* apply *unless* the civilians have the required "connection" to military authorities.[9]

Historical Overview

The origins of Article 31(b) flow from a long process of converging legal doctrines from both the civilian legal practice and military law.[10] Gradually, subtle and not so subtle

---

[3] For a historical review see Manuel E. F. Supervielle, *Article 31(b): Who Should Be Required To Give Warnings?*, 123 MIL. L. REV. 151 (1989).

[4] UCMJ arts. 1-141 (1988).

[5] UCMJ art. 31 (1988). Article 31 provides in full:

> (a) No person subject to this chapter may compel any person to incriminate himself or to answer any question the answer to which may tend to incriminate him.
>
> (b) No person subject to this chapter may interrogate, or request any statement from an accused or a person suspected of an offense without first informing him of the nature of the accusation and advising him that he does not have to make any statement regarding the offense of which he is accused or suspected and that any statement made by him may be used as evidence against him in a trial by court-martial.
>
> (c) No person subject to this chapter may compel any person to make a statement or produce evidence before any military tribunal if the statement or evidence is not material to the issue and may tend to degrade him.
>
> (d) No statement obtained from any person in violation of this article, or through the use of coercion, unlawful influence, or unlawful inducement may be received in evidence against him in a trial by court-martial.

[6] 10 M.J. 206 (C.M.A. 1981).

[7] United States v. Penn, 39 C.M.R. 194 (C.M.A. 1969).

[8] *Duga*, 10 M.J. at 210.

[9] *Penn*, 39 C.M.R. at 198.

[10] The right against self-incrimination arose in 16th century England as a shield to protect the criminal accused from government intrusion. *See* 8 J. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW, § 2251, at 295-318 (McNaughton rev. ed. 1961). Eventually, this right established itself in the United States as protection against religious and political persecutions. The Fifth Amendment prohibits the federal government from compelling any person to be a witness against himself in any criminal case. U.S. CONST. amend. V.

Another legal doctrine that contributed to the development of Article 31 was the Common Law Rule of Confessions. This body of law developed in 18th century England to exclude untrustworthy statements. *See* 3 J. WIGMORE, EVIDENCE IN TRIAL AT COMMON LAW, § 822, at 329-36 (Chadbourn rev. 1970). Beginning in 1884, the United States Supreme Court adopted the Common Law Rule of Confessions by acknowledging that, under certain circumstances, involuntarily obtained confessions were nothing more than untrustworthy hearsay. *See* Hopt v. Utah, 110 U.S. 574 (1884). Over time, the Supreme Court began the process of fusing Fifth Amendment protection with the law of confessions. *See* Bram v. United States, 168 U.S. 532 (1897); Brown v. Mississippi, 297 U.S. 278 (1936); Lisenba v. California, 314 U.S. 219 (1941). *See* Supervielle, *supra* note 3.

pressures were recognized to exist in the military based on differences in rank and duty position that unfairly could compel a soldier to disregard his or her Fifth Amendment rights and also produce an untrustworthy confession. By 1950, both military and civilian law had blended Fifth Amendment protection, due process, and the law of confessions to such an extent[11] that the broad sweeping language of Article 31 in the *1951 Manual for Courts-Martial*[12] could fuse these legal doctrines into one statutory rule.

Article 31(b) Interpreted

Since the creation of Article 31(b), the COMA has sought a logical interpretation and an analytical framework to determine, among other things, who must give the warnings and when the warnings must be given.[13] Before 1981, the COMA struggled through a series of tests, each seeking to accommodate the perceived objectives of Article 31(b). The first test applied "literally" the language of Article 31(b).[14] Under this test, the COMA would ask whether the questioner was a person subject to the Code and whether the person questioned was a suspect or an accused. If both conditions existed then Article 31(b) applied. The second test, the "officiality" test, required Article 31(b) right warnings only if: (1) the interrogator acted officially concerning law enforcement; (2) the inquiry was in furtherance of some official investigation; and (3) the interrogator reasonably suspected the person of an offense.[15] Therefore, official questioning—such as counseling sessions—would not trigger Article 31(b) if the questions were not in furtherance of a law enforcement activity.[16] A third, and short-lived, test surfaced in 1975 in *United States v. Dohle*,[17] known as the "position of authority" test. This test focused on the suspect's state of mind by asking whether the questioner's position could have pressured the person into responding to the inquiry.[18]

The *Duga* Analysis

It took nearly thirty years for the present two-prong test to form. In *United States v. Duga*,[19] the COMA reached back into the past, to revise the decision of *United States v. Gibson*[20] and announced a clear two-prong test. Chief Judge Everett declared:

> in light of Article 31(b)'s purpose and its legislative history, the Article applies only to situations in which, because of military rank, duty, or other similar relationship, there might be subtle pressure on a suspect to respond to an inquiry. . . . Accordingly, in each case it is necessary to determine whether (1) a questioner subject to the Code was acting in an official capacity in his inquiry or only had a personal motivation; and (2) whether the person questioned perceived that the inquiry involved more than a casual conversation. . . . Unless both prerequisites are met, Article 31(b) does not apply.[21]

In *Duga,* an Air Force security policeman, aware of recent thefts, casually approached his friend Duga, another security

---

[11] Parallel to the American civilian law, the military was charting its own path toward Article 31(b). *A Manual for Courts-Martial,* United States Army, 1917 (1917 *Manual*), first recognized the inherent influence of military rank and duty position as potential sources of involuntary confessions. Paragraph 225 of the 1917 *Manual* announced a "preference" for the use of a preliminary warning to be given during investigations that essentially would remind soldiers of their right to remain silent. This preference would become a "requirement" in subsequent *Manuals for Courts-Martial.* See Supervielle, *supra* note 3, at 151.

[12] MANUAL FOR COURTS-MARTIAL, United States Army, 1951. [hereinafter 1951 MANUAL].

[13] "[A] series of cases from the United States Court of Military Appeals which interpret and limit Article 31(b) demonstrates that Article 31(b) is anything but 'plain' in this sense." United States v. Jones, 19 M.J. 961, 966 (A.C.M.R. 1985).

[14] United States v. Wilson, 8 C.M.R. 48 (C.M.A. 1953). Here the COMA applied Article 31 even though the *1951 Manual* was not in effect at the time of the alleged offense.

[15] This test arose out of the dissenting opinion of Judge Latimer in United States v. Wilson, 8 C.M.R. 48 (C.M.A. 1953).

[16] This test focused on the officiality of the questioner's motives at the time of the questioning; *see* United States v. Seay, 1 M.J. 201, 203 n.3 (C.M.A. 1975). If the motivation was for personal reasons, such as concern for the suspect, then Article 31(b) was not triggered. United States v. Beck, 35 C.M.R. 305 (C.M.A. 1965). Unfortunately, it did not determine if the questioner's military position or status could have caused the suspect to respond; *see* United States v. Wheeler, 27 C.M.R. 981 (A.F.B.R. 1959).

[17] 1 M.J. 223 (C.M.A. 1975).

[18] *Id.* at 225, 226 n.4. In this case, the accused, Private First Class Dohle, responded to questions from his sergeant who had been detailed as a guard. This test did not consider the motivation of the questioner as within the scope of Article 31(b).

[19] 10 M.J. 206 (C.M.A. 1981).

[20] 14 C.M.R. 164 (C.M.A. 1954). The COMA added to the "officiality" test then in use by requiring the person questioned to have reason to be aware of the official character of the interview. This developed into the perception prong of the *Duga* test.

[21] *Duga,* 10 M.J. at 210 (citations and footnotes omitted).

policeman, and asked him "what was he up to?"[22] Duga responded with incriminating remarks about the thefts.[23] The COMA reasoned that because Duga did not perceive any "officiality" to the questions no subtle pressures on him to respond could have existed and, as a result, a rights warning was not required.[24]

What is the purpose behind *Duga*? Congress intended to provide certain protections for military soldiers who—by virtue of being in the military—might feel pressured into speaking because of rank, duty, or other similar relationships.[25] The rationale and policy objective behind Article 31(b) was to recognize that military rank and duty position can pressure a soldier to confess and, therefore, to incorporate into the military justice system a safeguard comprised of a mandatory rights warning and a built-in exclusionary rule for failing to provide the rights warning. In Article 31(b), the rights warning seems to serve three purposes: (1) to neutralize the implicit coercion or influence generated by rank and duty position; (2) to inform the ignorant suspect or accused of his or her constitutional rights; and (3) to alert the suspect or accused that the questioner is not acting in the suspect's best interest.

Is the *Duga* analysis still valid? Yes, but with a narrow law enforcement or disciplinary element superimposed onto the first prong.[26] One of several recent decisions narrows the first Duga prong. In *United States v. Loukas*,[27] the COMA admitted the unwarned responses to questions from the onboard aircraft flight crew chief who suspected the accused of recent drug use. The crew chief confronted Loukas about drug use after observing Loukas acting nervously, gesturing, and hallucinating.[28] The COMA held that Article 31(b) did not apply because the crew chief was not acting in the official capacity of a law enforcement or disciplinary investigation. Article 31(b) warnings apply "only when the questioning is done during an official law enforcement investigation or disciplinary inquiry."[29] This modification narrows the relationship that could cause the "subtle pressure" to law enforcement or disciplinary investigations.[30] The narrowing of the *Duga* standard toward law enforcement or disciplinary investigations should not have any appreciable impact on the first element, or the threshold determination, in cases of civilian questioners. Technically—at least for the present—both *Duga* and *Loukas* apply to the second element of Article 31(b)—that is, when to give the warnings—having already determined that the questioners are subject to the Code. Whether the questioners have a law enforcement or disciplinary purpose necessarily comes after an examination of whether the questioner is subject to the Code. Whether to impose this narrow law enforcement or disciplinary focus on the threshold issue of who is subject to the Code, is an entirely separate consideration.

Warning Requirements for Civilian Questioners

What role should Article 31(b) warnings play in situations when an individual soldier feels coerced to respond, but not because of any official military situation? Questions by coworkers, physicians, social workers, attorneys, or civilian police investigators might produce subtle pressures on a suspect to respond to the questions.[31] Or could merely being a member of the military, with all its implicit honor and duty ramifications, create subtle pressures that could force a response from a soldier when confronted by an official civilian questioner?[32] To address these issues, the COMA crafted specific rules for the civilian questioner.

The Threshold Issue

When those doing the questioning are not military, the courts address the threshold issue of whether the questioners are subject to the Code to determine whether or not Article 31(b) applies.[33] *Moreno* and *Lonetree* examine the first ele-

---

[22] *Id.* at 207.

[23] *Id.*

[24] *Id.* at 211.

[25] *Id.* at 210.

[26] William J. Kilgalin, *Who Must Read Article 31(b) Warnings: COMA Decides Loukas*, ARMY LAW., June 1990, at 46.

[27] 29 M.J. 385 (C.M.A. 1990). Similarly, in United States v. Good, 32 M.J. 105 (C.M.A. 1991), the COMA again noted the "law enforcement or disciplinary" theme applicable to the first *Duga* prong.

[28] *Loukas*, 29 M.J. at 386.

[29] *Id.* at 387.

[30] Whether *Loukas* is limited to its facts—involving an emergency or a public safety situation—is difficult to determine.

[31] *See, e.g.*, Oregon v. Hass, 420 U.S. 714, 722-23 (1975) (interrogation by civilian police).

[32] A form of instilled obedience is inherent in the training of military soldiers. Conditioned to obey, a service member, when asked for a statement about an offense, may feel to be under a special obligation to make such a statement. United States v. Duga, 10 M.J. 206, 209 (C.M.A. 1981).

[33] United States v. Penn, 39 C.M.R. 194, 198 (C.M.A. 1969).

ment to test for persons subject to the Code. If the persons are *not* subject to the Code, the analysis stops and Article 31(b) rights do not apply.[34] The policy behind Article 31(b), to protect soldiers from subtle pressures in the military that could pressure soldiers into responding to questions without considering Fifth Amendment rights against self-incrimination, does not apply when the questioner is not subject to the Code.[35] Article 31(b) protection does not apply to civilians questioners unless the civilians have the required "connection" to military authorities.[36]

Connections that Trigger Article 31(b)

The long-held rule for civilian questioners states that civilian police need not provide Article 31(b) warnings unless the scope and character of cooperation between civilian and military personnel show that the two investigations have: (1) merged into an indivisible entity; or (2) the civilian investigator acts in furtherance of a military investigation or in any sense as an instrument of the military.[37] This rule naturally lends itself to a division into its component parts of "merger" and "in furtherance of, or instrumentality." By separating the two issues, the analysis can focus on the subtleties of each and articulate a clear test. Unfortunately, the courts have not always left a clear analysis in their wake.

Instrumentality Cases

One of the first cases to deal with Article 31(b) and civilian interrogation was *United States v. Grisham.*[38] Grisham, a GS-9 civilian stationed in France, sought to exclude his four unwarned statements that he gave to the French police. Grisham gave his statements in the presence of a United States military investigator and translator.[39] Viewing the case as an "instrumentality" issue, the COMA ruled that the French police, though clearly not subject to the Code, must provide Article 31(b) warnings if they interrogate a United States soldier in furtherance of any United States military investigation, or in any sense as an instrument of the United States military.[40] Ruling against Grisham, the COMA concluded that American officials present during the French interrogation took no part in the questioning and did not provide any guidance on the course of the questioning.[41] Therefore, the French police did not act as instruments of the United States military.[42]

In a subsequent "instrumentality" case, *United States v. Holder*,[43] the COMA considered whether Federal Bureau of Investigation (FBI) agents arresting military deserters must comply with Article 31(b). Finding no military control over the duties, responsibilities, or operation of the FBI, the COMA held that Article 31(b) did not apply. "[T]here is no commingling of responsibility between the Bureau and the military services, for each is distinctly separate from the other. . . . Thus, . . . the services neither directly nor indirectly have any control over or the right to direct the manner in which the FBI apprehends military violators."[44]

In *United States v. Quillen*,[45] the COMA required post exchange store detectives to provide Article 31(b) rights warnings when they detain shoplifting suspects on post.[46] Treating the case as an "instrumentality" issue, the COMA reasoned that the store detectives acted at the "behest" of military authorities and in furtherance of the military's duty to investigate crime on post.[47] At least one writer argues for the limitation of *Quillen* to its facts.[48] Yet strangely enough, the COMA alluded to the second key element—that is, when is a warning required—usually treated under a *Duga* analysis, and

---

[34] United States v. Lonetree, 35 M.J. 396, 403 (C.M.A. 1992).

[35] *Duga*, 10 M.J. at 209.

[36] *Penn*, 39 C.M.R. at 198.

[37] United States v. Temperly, 47 C.M.R. 235 (C.M.A. 1973); *Penn*, 39 C.M.R. at 194; United States v. Holder, 28 C.M.R. 14 (C.M.A. 1959).

[38] 16 C.M.R. 268 (C.M.A. 1954).

[39] *Id.* at 269.

[40] *Id.* at 271.

[41] *Id.*

[42] *Id.*

[43] 28 C.M.R. 14 (C.M.A. 1959).

[44] *Id.* at 16.

[45] 27 M.J. 312 (C.M.A. 1988).

[46] *Id.* at 314.

[47] *Id.* at 314-15.

[48] Jody Prescott, *United States v. Quillen: The Status of AAFES Store Detectives*, ARMY LAW., June 1989, at 33.

noted that detaining and questioning suspects was an exercise of "law enforcement activities" and was anything but "casual" conversation.[49] The *Quillen* decision is more than puzzling in that respect. Conceivably, the COMA's decision may point to the eventual application of the narrow "law enforcement or disciplinary" focus to the threshold issue of "who is subject to the Code."

Merger Cases

In *United States v. Penn*,[50] the COMA established the rule that civilian investigators normally need not provide Article 31(b) advice to soldiers unless their investigation merges with a military investigation, or they act in furtherance or as an instrument of the military. Airman Basic Penn was under investigation by the Secret Service for forgery of government checks.[51] Treating the case as a "merger" issue, the COMA ruled that the Secret Service conducted a separate and independent investigation and, as a result, Article 31(b) did not apply.[52] Significantly, the COMA found no military control over the civilian investigator.[53] The COMA also found it significant that the only evidence collected by the Secret Service agent was that applicable to the federal charge.[54]

The COMA addressed the "merger" issue more recently in *United States v. Oakley*.[55] In *Oakley*, the civilian police interrogated Army Specialist Oakley on civilian fraud offenses.[56] During the questioning, a United States Army staff sergeant, present as the military liaison, advised Oakley to cooperate and even asked a few of his own questions.[57] Viewing this as a "merger" issue, the COMA ruled that the civilian police investigation was not a "joint" investigation with the military authorities, and that Article 31(b) did not apply.[58] The COMA concluded that the civilian state police were in control of their investigation and in pursuit of a civilian conviction.[59] The presence of the military liaison did not, the COMA decided, reflect a "joint" investigation.[60] Based on the "totality of the circumstances," the COMA concluded that Oakley's cooperation resulted from his freely drawn belief that cooperation was in his best interest.[61]

The Emergence of a Specific Analysis in the Case of *United States v. Moreno*

Staff Sergeant (SSG) Manuel R. Moreno,[62] charged with the sexual abuse of his fourteen-year-old stepson, sought to exclude incriminating statements that he had made to the state social worker, Ms. Cirks.[63] The Army's Criminal Investigation Division (CID) previously had closed its investigation after obtaining sworn statements from the wife and the child, and the videotaped interview of the child taken by Ms. Cirks.[64] The Texas Department of Human Services operated on Fort Bliss pursuant to an agreement to provide social services in cases of child abuse.[65] Unknown to the military prosecutor, Ms. Cirks subsequently had conducted an interview with the accused.[66] At this interview, Ms. Cirks told SSG

---

[49] *Quillen*, 27 M.J. at 315.

[50] United States v. Penn, 39 C.M.R. 194 (C.M.A. 1969).

[51] *Id.* at 199.

[52] *Id.* at 201.

[53] *Id.* at 202.

[54] *Id.*

[55] 33 M.J. 27 (C.M.A. 1991).

[56] *Id.* at 28.

[57] *Id.* at 32.

[58] *Id.*

[59] *Id.*

[60] *Id.* The COMA de-emphasized the admonishments by Oakley's military superior. Commenting on the liaison asking questions, the COMA stated, "these were innocuous and relatively inconsequential to the investigation."

[61] *Id.*

[62] United States v. Moreno, 36 M.J. 107 (C.M.A. 1992).

[63] *Id.* at 110.

[64] *Id.* at 114.

[65] *Id.*

[66] *Id.* at 115. Apparently the defense counsel knew of the pending interview.

Moreno that she was a state employee and subject to subpoena.[67] She gave no Article 31(b) warnings at any time during the interview.[68]

Asking whether Ms. Cirks was a person subject to the Code, the COMA simultaneously raised the merger and instrumentality issues.[69] The COMA found that the military investigation essentially was over at the time of the interview and no communication between the "two camps" had occurred.[70] Further, the COMA reasoned that, although the military did share some information about the victim, Ms. Cirks acted as a social worker, always "operating in pursuit of her limited state objectives."[71]

Focusing next on the "instrumentality" issue, the COMA found that Ms. Cirks had an independent duty to investigate these offenses, and found no indication of her assignment to the United States Government for the purposes of furthering a military criminal investigation.[72] The COMA noted that investigating the same pattern of misconduct and sharing of information does not convert state officials into agents or instruments of the military.[73] The COMA reviewed the definition of "agency" and noted that no military control over Ms. Cirks existed.[74] "[O]ne of the prime elements of an agency relationship is the existence of some degree of control by the principal over the conduct and activities of the agent."[75] Finding her role similar to that of teachers and health care workers, the COMA reasoned that Ms. Cirks was not a functionary of the military.[76] The existence of an agreement for the state to provide social services "made no difference" to the COMA.[77]

One problem with the *Moreno* decision lies in its failure to articulate clear and distinct factors to consider for each issue and to designate the weight to give each factor. Although the *Moreno* decision seems consistent with the prior *Grisham*, *Penn*, and *Holder* cases, its treatment of the issues, however, clouds the analysis. A second problem is *Moreno*'s treatment of the "instrumentality" issue in terms of "agency." The agency analysis potentially is inconsistent with the COMA's teachers and health care workers analogy. Not all teachers or health care workers are state employees, some work for the military. This inconsistency in the agency analysis may affect future cases deciding whether Article 31(b) warnings apply to government civilian employees, government contractors, or other civilians working for, or in association with, the military. Undoubtedly, many civilian government employees have responsibilities that could cause them to question a soldier they suspect of an offense. Does Article 31(b) apply to them? Will Article 31(d) exclude any unwarned admissions they might obtain? *Moreno* does little to resolve these issues. This deficiency eventually may push the COMA to narrow the threshold issue to require a law enforcement or disciplinary purpose, much like the narrowing of the *Duga* test.

The Case of *United States v. Lonetree*

The COMA articulated a more distinct analysis in *United States v. Lonetree*.[78] Sergeant (SGT) Clayton Lonetree, a United States Embassy guard in Moscow, conspired with Soviet agents to commit various acts of espionage and related offenses.[79] After his reassignment to the United States Embassy in Vienna, SGT Lonetree approached nonmilitary United States intelligence agents "Big John and Little John"—collectively known as the "Johns."[80] Over an approximately ten-day-period, Lonetree met with the Johns and discussed his dealings with the Soviets.[81] The agents did not provide Article

---

[67] *Id.*

[68] *Id.* The COMA held that no Fifth Amendment Miranda rights were required because the accused was not in the custody of law enforcement officials.

[69] *Id.* at 114.

[70] *Id.* at 115.

[71] *Id.*

[72] *Id.*

[73] *Id.*

[74] *Id.* at 117.

[75] *Id.* (citing 3 AM. JUR. 2D, *Agency* § 2, at 510 (1966)).

[76] *Id.*

[77] *Id.*

[78] 35 M.J. 396 (C.M.A. 1992).

[79] *Id.* at 399 n.2.

[80] *Id.* at 399.

[81] *Id.*

31(b) warnings and advised Lonetree that his information would be kept in confidence.[82] They told him that someone else would decide whether to court-martial him.[83] The Johns advised the Naval Investigative Service (NIS) of their contact with Lonetree about a week after Lonetree initially contacted them, and just a few days before his eventual apprehension.[84] On their last meeting with Lonetree, the Johns introduced him to the NIS agents, who apprehended him, advised him of his Article 31(b) rights, and obtained more details of his crimes.[85]

The defense urged that the Johns' failure to provide Article 31(b) warnings tainted the confessions, arguing that the intelligence investigation merged with the subsequent military investigation. The defense also argued that the Johns were acting as instruments of the military.[86] In support of its position, the defense noted Executive Order No. 12,333,[87] which permitted intelligence agents to cooperate and assist law enforcement authorities to the extent authorized by law.[88]

The COMA separated the "merger and instrumentality" issues, and dealt with each. On the merger issue, the COMA cited with approval the two-prong analysis of the Court of Review, which considered: (1) the purpose of each investigation; and (2) whether the intelligence agents acted separately and independently of the military.[89] Examining the purpose of the two investigations, the COMA concluded that the Johns were attempting to ascertain the extent of damage done from an "intelligence" perspective, and not to perfect a criminal investigation.[90] The COMA was not persuaded by the Johns having provided the NIS with all the information that Lonetree had given to them.[91] Sharing information, as in *Moreno,* apparently is not a critical factor.

To resolve the second prong of the merger issue, the COMA fashioned a three-step analysis. First, the COMA asked if any coordination of activities between the Johns and the NIS occurred; second, the COMA determined if the Johns sought any guidance or advice from the NIS on how to conduct the intelligence investigation; and third, the COMA asked whether the NIS investigation influenced the intelligence investigation.[92] The COMA examined the facts and quickly resolved this issue:

> Our review of the record confirms. . . . The Johns did not coordinate their activities with any military authorities. . . . Lonetree does not assert that the Johns requested or sought the advice or guidance of the NIS. Moreover, the Johns' investigation did not begin as a coordinated effort with the NIS, and it was not influenced by military authorities . . . .[93]

Confident in its conclusion on the "merger" issue, the COMA turned to whether the Johns were instruments of the NIS. Citing the previous decisions in *Quillen* and *Grisham,* the COMA concluded that: (1) the Johns were not employees of, or subordinate to, the NIS; (2) the NIS exercised no control, direction, or supervision over the Johns; (3) the intelligence investigation was not at the "behest" of the NIS; and (4) mere cooperation with military officials does not necessarily convert someone into an instrumentality of the military.[94] The COMA distinguished *Quillen,* noting that the "Executive Order did not make the Johns subordinate to, or under the control of the military, and the Executive Order did not compel the Johns to conduct their investigation 'at the behest of the military authorities [or] in furtherance of the [military's] duty to investigate' crimes."[95] Consistent with *Grisham,* the COMA reasoned that the Johns were conducting an independent investigation and were not serving as instruments of the military.[96] Therefore, as persons not subject to the Code, the

---

[82] *Id.* at 400.

[83] *Id.*

[84] *Id.* at 404.

[85] *Id.*

[86] *Id.* at 403.

[87] *Id.* n.6.

[88] *Id.*

[89] *Id.* at 404.

[90] *Id.*

[91] *Id.*

[92] *Id.*

[93] *Id.*

[94] *Id.*

[95] *Id.* at 405.

[96] *Id.*

Johns had no duty to advise SGT Lonetree of his Article 31(b) rights.[97] Although consistent with prior case law, the *Lonetree* decision seems to refine the analysis by formulating specific factors to determine both issues of "merger and instrumentality." As in *Oakley*, the COMA appears to have made its determination based on the "totality of the circumstances."[98]

Two Specific Tests

A careful examination of the *Lonetree* decision reveals two clear and workable tests that apply to resolving the "merger and instrumentality" issues. Specifically, the merger test condenses into a two-prong analysis consisting of the following inquiries: (1) What are the different purposes or objectives to the investigations? and (2) Are the investigations conducted separately? To analyze the second prong, the COMA provided three factors to consider: (a) was the activity coordinated; (b) did the military give guidance or advice; and (c) did the military influence the civilian investigation. The COMA, however, failed to provide conclusive guidance on how much weight to apply to these factors.[99] Does any amount of coordination trigger Article 31(b)? Apparently not—merely sharing information and cooperation pursuant to agreements or executive orders will not trigger Article 31(b). The Johns provided the NIS with the information that they had obtained from SGT Lonetree with no ill effects on the COMA's decision. The existence of an agreement in *Moreno,* or an executive order in *Lonetree*, was virtually irrelevant to the COMA.[100]

Similarly, the instrumentality test separates into three clear and concise questions: (1) whether the civilian is employed by, or otherwise subordinate to, military authority; (2) whether the civilian is under the control, direction, or supervision of military authority; and (3) whether the civilian acted at the behest of military authority or, instead, had an independent duty to investigate.[101] Again, the effect of cooperative agreements between civilian agencies and the military is clear. Agreements or executive orders to cooperate or assist military authorities are not enough, by themselves, to convert civilian investigators into instrumentalities of the military.[102] Although unspecified, the COMA apparently weighted these three conditions—as in the *Oakley* decision—based on the "totality of the circumstances." Neither *Lonetree* nor any prior case specifically states that the existence of any one of the three conditions would trigger Article 31(b).

Application to Prior Decisions

Given these refined tests, how do they compare with the previous decisions of *Holder, Oakley,* and *Quillen*? Are they a continuation or alteration of prior law?

In *Holder*, FBI agents apprehended deserters without providing Article 31(b) rights warning. The COMA found no military control or direction over the FBI and no commingling of responsibilities between the FBI and the military.[103] The COMA found no duty to provide Article 31(b) warnings because the FBI did not act for the armed services.[104] Applying the refined instrumentality test yields a similar conclusion: (1) no subordinate relationship existed; (2) the military exercised no control, direction, or supervision over the FBI; and (3) the FBI had an independent duty to investigate.

In *Oakley,* civilian police questioned a soldier in the presence of a military liaison. The COMA focused on the military's lack of control over the state police and the state's independent duty to investigate.[105] Again, applying the refined instrumentality test, one reaches a similar result: (1) no subordinate relationship existed; (2) the military exercised no control, direction, or supervision over the civilians; and (3) an independent duty to investigate existed for the civilian law enforcement officials. In *Oakley*, the COMA paused only briefly to consider if the presence of the military liaison and his questioning affected the accused or how the civilians conducted their investigation. Based on the "totality of the circumstances," the COMA reasoned that such presence had no real influence on the accused or the civilian investigation.[106] Significantly, the *Oakley* decision provides guidance on what weight to apply to these factors—the totality of the circumstances.

---

[97] *Id.*

[98] The COMA did not state what weight it gave to each factor. The analysis in *Lonetree,* however, was similar to that applied in *Oakley.*

[99] The *Oakley* decision addressed the amount of weight to be given to these factors.

[100] United States v. Moreno, 36 M.J. 107, 117 (C.M.A. 1992); *Lonetree*, 35 M.J. at 405.

[101] *Lonetree,* 35 M.J. at 404.

[102] *Id.* at 405; *Moreno,* 36 M.J. at 117.

[103] United States v. Holder, 28 C.M.R. 14 (C.M.A. 1959).

[104] *Id.*

[105] United States v. Oakley, 33 M.J. 27 (C.M.A. 1991).

[106] *Id.* at 32.

In *Quillen,* the COMA focused on the exchange detective's actions as governmental and law enforcement in nature and conducted at the behest of the military.[107] Applying the refined instrumentality test to *Quillen* yields a result consistent with the COMA's own conclusion. Given the store detective's subordinate relationship with on-post military authorities and the ability of those authorities to direct or supervise the manner in which the detectives detain suspects on post, under the totality of the circumstances, Article 31(b) applies.

Conclusion

Congress created Article 31(b) to ensure Fifth Amendment protection in a military environment where "subtle pressures" can override a soldier's invocation of his or her constitutional right to remain silent. Given the general inapplicability of Article 31(b) to civilians who question soldiers, the COMA crafted several tests to determine when civilian questioners approach the "subtle pressures of the military." The *Moreno*, *Oakley*, and *Lonetree* decisions illustrate the recent application of these tests. In *Lonetree,* the COMA established a clear analysis to determine when Article 31(b) applies to civilian questioners who usually are not subject to the Code. Soldiers have no Article 31(b) rights when questioned by civilians not subject to the Code—whether social workers, civilian police or civilian intelligence agents—so long as those civilians conduct their own separate investigation and are not acting in furtherance, or as instruments, of the military. The policy concerns of protecting soldiers from "other subtle pressures" that could coerce a confession simply do not extend to civilian investigators operating independently from the military.

Should Article 31(b) warning requirements extend further? Should the law require social workers or civilian intelligence agents—albeit pursuing separate investigations—to provide Article 31(b) rights to soldiers whom they question? The key to answering this question is knowing where to strike a proper balance between the law enforcement needs of the government and the rights of the individual. If it follows the analysis in *Moreno* and *Quillen*, the COMA may move toward striking such a balance by restricting the application of Article 31(b) on civilian questioners. Whether a questioner is motivated by law enforcement or disciplinary purposes normally should follow a determination that the questioner is subject to the Code. The *Moreno* decision, coupled with that of *Quillen,* may foreshadow the intrusion of a narrow law enforcement and disciplinary focus into the "merger and instrumentality" tests currently used to resolve whether a civilian questioner is subject to the Code. The COMA's detour into an agency analysis in *Moreno* could extend the application of Article 31(b) warning requirements to all civilian government employees. Such a broad application would far exceed the legislative intent behind Article 31(b). Following the agency analysis would necessitate the COMA's imposing a law enforcement or disciplinary inquiry "brake" to prevent the wholesale application of Article 31(b) to civilian government employees. Given the demonstrated strengths and consistent application of the *Lonetree* analysis, the COMA should avoid the inconsistent agency approach and use the *Lonetree* analysis to determine when the civilian questioners approach the "subtle pressures of the military" that Article 31(b) will apply.

[107] United States v. Quillen, 27 M.J. 312 (C.M.A. 1988).

TJAGSA Practice Notes

Faculty, The Judge Advocate General's School

Criminal Law Notes

Failure to Preserve Evidence May Result in a Due Process Violation

In *United States v. Gill*,[1] the accused argued that he was denied due process of law because the government failed to preserve potentially exculpatory evidence. The accused was charged with assault consummated by a battery on a child under the age of sixteen, assault in which grievous bodily harm was intentionally inflicted, and unpremeditated murder.[2] The victim was the accused's four-month-old daughter. An autopsy was performed on the child. Although numerous fractures and bruises were found on the child, the cause and manner of death were not determined. The autopsy findings, however, suggested asphyxiation.[3]

[1] 37 M.J. 501 (A.F.C.M.R. 1993).

[2] UCMJ arts. 128, 118 (1988).

[3] *Gill*, 37 M.J. at 504.

Samples of the victim's blood and stomach contents were collected during the autopsy. The samples were tested for alcohol and illicit drugs but were not tested for other poisons. The testing process consumed most of the samples; the rest were discarded. Shortly thereafter, the body was embalmed and it no longer was possible to obtain fluid or tissue samples for toxicology testing. The accused argued that he was denied due process of law because he was deprived of the ability to prove that the child died from accidental poisoning. The accused wanted to show the child did not die of asphyxiation as the result of his acts.

The government violates an accused's right to due process of law if the government destroys or fails to preserve evidence when "(1) the evidence possesses an exculpatory value that was apparent before it was destroyed, (2) it is of such a nature that the accused would be unable to obtain comparable evidence by other reasonably available means, and (3) the government destroyed the evidence in bad faith."[4] In *Gill*, the court noted that the samples may have had some exculpatory value before they were destroyed and the accused could not have obtained comparable evidence by other means. The court concluded, and the defense conceded, that no bad faith existed on the part of the government. The samples were consumed or discarded in accordance with routine medical laboratory practice and the family had requested the embalming of the child's body. The issue of failing to preserve evidence, however, became moot when the members found the accused not guilty of causing the child's death, but guilty of assault with a means likely to cause grievous bodily harm.[5]

Even though the destruction of evidence issue became moot as a result of the findings of guilty in this case, the court probably would not have found a due process violation because no evidence of bad faith or motive on the part of the government existed in destroying or consuming the samples.[6] Counsel, however, can learn an important lesson from this case. Issues involving the destruction of evidence are not limited to the destruction or failure to preserve body fluids and tissue samples. Destruction of evidence issues also are raised when a "crime scene" or an automobile[7] is released to the owner or when evidence of a crime—such as, stolen property or illicit drugs—is lost or inadvertently destroyed. If evidence may be destroyed or consumed during or following a testing process or if evidence is going to be returned to the owner, the defense should be notified and given an opportunity to inspect the evidence or to be present during the testing. Government counsel can avoid these types of issues by working closely with and instructing individuals who conduct tests or handle evidence to be alert to situations when the evidence may be lost or destroyed. If a possibility exists that the evidence may be destroyed or consumed, government counsel should notify the defense and give the defense or its representative an opportunity to inspect the evidence or be present during the testing process.[8] Major Wilkins.

Medical Diagnosis Hearsay Has Its Limits

The mere presence of a doctor during the questioning of a child abuse victim will not place the victim's statements in the medical treatment exception to the hearsay rule.[9] Nor will later repeating the statements to a doctor with no one else present salvage their admissibility. The United States Court of Military Appeals (COMA) reached these conclusions in the recent case of *United States v. Armstrong*.[10]

In *Armstrong*, trial counsel interviewed a victim in the presence of a psychologist with whom the victim had established

---

[4] *Id.* at 506; *see* California v. Trombetta, 467 U.S. 479, 489 (1984). In order to rise to the level of a due process violation, evidence lost or destroyed by the government "must both possess an exculpatory value that was apparent before the evidence was destroyed, and be of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means." *Trombetta,* 467 U.S. at 489; *see also* Arizona v. Youngblood, 488 U.S. 51 (1988), in which the Court clarified its decision in *Trombetta* by holding that the government's failure to preserve potentially exculpatory evidence does not automatically violate due process unless the defendant can show that the evidence was destroyed in bad faith.

[5] *Gill,* 37 M.J. at 507.

[6] A court's response to a situation when the destroyed evidence is clearly exculpatory is difficult to determine. Conceivably, when faced with the destruction or loss of clearly exculpatory evidence, the court would hold the government to a greater duty to preserve the evidence. *See* 1 FRANCIS A. GILLIGAN & FREDRIC I. LEDERER, COURT-MARTIAL PROCEDURE § 11-46.30 (1991).

[7] United States v. Mobley, 31 M.J. 273 (C.M.A. 1990). The victim was raped and murdered in her automobile. Numerous pieces of crucial evidence were obtained from the vehicle. The vehicle was returned to the victim's husband without any notice to the defense or without giving the defense an opportunity to inspect.

[8] *See* United States v. Garries, 22 M.J. 288, 293 (C.M.A. 1986) ("the better practice is to inform the accused when testing may consume the only available samples and permit the defense an opportunity to have a representative present"); *see also* United States v. Mobley, 31 M.J. 273, 277 ("there were no compelling circumstances which dictated the immediate release of the vehicle [to the owner] without at least notifying appellant and his representatives and giving them a reasonable chance to inspect the automobile").

[9] MANUAL FOR COURTS-MARTIAL, United States, MIL. R. EVID. 803(4) (1984) [hereinafter MCM] provides the following:

> The following are not excluded by the hearsay rule, even though the declarant is available as a witness . . . (4) *Statements for Purposes of Medical Diagnosis or Treatment.* Statements made for purposes of medical diagnosis or treatment and described medical history, or past or present symptoms, pain, or sensation, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment.

[10] 36 M.J. 311 (C.M.A. 1993).

an ongoing therapeutic relationship more than eight months earlier.[11] The COMA held that the statements made by the victim during this interview with the trial counsel were not admissible under the medical treatment exception to the hearsay rule. The COMA further held that even though the victim repeated her statements to the psychologist in a therapeutic setting some days later this "does not change the character of the statements."[12] The COMA's holding came in spite of the Army Court of Military Review's (ACMR) finding that the later statements made solely in the psychologist's presence were "much more extensive" than those made to the counsel in the doctor's presence.[13] By eliciting the original statements through his own questioning, the trial counsel tainted what otherwise might have been useful and potentially admissible evidence.

The medical diagnosis or treatment exception to the hearsay rule is based on "the presumption that an individual seeking relief from a medical problem has incentive to make accurate statements"[14] to the person providing medical care.[15] "Such answers [to medical questions] will promote his [or her] own well-being."[16] To qualify for the exception, the statements also must be made for the purpose of medical diagnosis or treatment.[17] When those conditions are established, statements generally are considered sufficiently reliable to be treated as exceptions to the hearsay rule.

A patient's awareness of what is at stake is crucial to acceptance of his or her statements as reliable. In cases involving a child-patient, such awareness likely is to be an issue. Courts have accepted a number of means to establish that a child is aware of the need to be truthful. For example, such awareness can be inferred from the child's past experience with doctors and hospitals.[18] More simply, the child can testify that he or she understands what a doctor is.[19] In some cases, the person relating the hearsay has testified that the child "understood the 'seriousness' of" the situation[20] or that "the victim had an expectation of 'feeling better' as a result of the consultations."[21] When *Armstrong* was decided by the ACMR, some of the child's hearsay statements—other than those elicited by counsel—were found to be admissible because the doctor testified that the child "was above average in intelligence, and that he [the doctor] had no reason to believe that she did not understand 'what a doctor is.' "[22]

Limits exist, however, on the court's discretion to admit such evidence. In *United States v. Avila*,[23] the COMA found that the medical treatment exception to the hearsay rule could not be established when a child made statements to a psychologist who deliberately *concealed* the fact that she was a psychologist.[24] The COMA explained:

> Obviously, very young children will not have the same understanding or incentive as adults when making statements to persons providing health care. Nevertheless, unless it appears that the child knows at least that

[11] The Army Court of Military Review's (ACMR) opinion established that the therapeutic relationship between the child and the psychologist began in March 1987 and continued until March 1989. United States v. Armstrong, 33 M.J. 1011, 1013 (A.C.M.R. 1991). Trial counsel's interview occurred in December 1987. The subsequent statements made to the psychologist alone occurred in January 1988. *Id.* at 1013. The ACMR concluded that the December statement was not admissible pursuant to Military Rule of Evidence 803(4), even though the psychologist "testified that he considered himself in control of this session." *Id.* Receipt of such evidence was harmless error, however, because the ACMR concluded that the "much more extensive" January statement *was* admissible. *Id.* at 1014.

[12] *Armstrong*, 36 M.J. at 313.

[13] *Armstrong*, 33 M.J. at 1014.

[14] MCM, *supra*, note 9, MIL. R. EVID. 803 analysis, app. 22, at A22-48.

[15] "[T]he statement need not have been made to a physician. Statements to hospital attendants, ambulance drivers, or even members of the family might be included." Statements to psychologists also are admissible as statements made for medical diagnosis or treatment. United States v. Welch, 25 M.J. 23, 25 (C.M.A. 1987).

[16] *Id.*

[17] *Id.* at 24.

[18] United States v. Dean, 31 M.J. 196, 203 (C.M.A. 1990); United States v. Lingle, 27 M.J. 704 (A.F.C.M.R. 1988).

[19] United States v. Quigley, 36 M.J. 750, 751-2 (A.C.M.R. 1993).

[20] United States v. Edens, 31 M.J. 267, 268-9 (C.M.A. 1990).

[21] United States v. Tornowski, 29 M.J. 578, 581 (A.F.C.M.R.) 1989.

[22] United States v. Armstrong, 33 M.J. 1011, 1013 (A.C.M.R. 1991).

[23] 27 M.J. 62, 66 (C.M.A. 1988).

[24] In *Avila*, the psychologist "also took care not to be associated with the social worker or trial counsel—people her mother had warned her not to talk to because they were bad and were trying to take away her daddy." *Id.*

> the person is rendering care and needs the information in order to help, the rationale for the exception disappears entirely.[25]

In *Armstrong,* the COMA found that the statements at issue did not fit into this hearsay exception. The court noted:

> First, the statements were made by the victim to trial counsel in preparation for trial, not by the victim to a doctor, physician, or other medical person. . . . Further, it cannot fairly be stated, given the circumstances surrounding these declarations, that this child made the statements in anticipation of being healed or cured of a disease or medical problem."[26]

In conclusion, the COMA in *Armstrong* agreed with the ACMR's decision that out-of-court statements made by a child abuse victim to a lawyer preparing for trial may not be admitted under Military Rule of Evidence 803(4) exception to the hearsay rule. Perhaps of greater significance to the practitioner, however, is the COMA's conclusion that when such statements are made to the trial counsel, similar statements made later in an arguably therapeutic environment also may be inadmissible. Although a doctor may be able to cure the child's wounds, a doctor cannot cure the inadmissibility of the child's out-of-court statements to trial counsel for 803(4) purposes. Mr. Baker, Summer Intern.

The COMA Affirms Desertion Conviction

Introduction

In *United States v. Thun,*[27] the COMA recently had an opportunity to review a desertion conviction that was based on an absence of very short duration. In affirming the conviction of Specialist Thaddeus Thun, who absented himself from his unit for three hours and fifteen minutes, the COMA held that the length of an unauthorized absence is not solely dispositive in determining whether the absence amounted to desertion. Before discussing *Thun* in detail, however, the offense of desertion will be examined.

Desertion[28]

The Uniform Code of Military Justice (UCMJ) recognizes three forms of desertion, the two most common forms being desertion with the intent to remain away permanently and desertion with the intent to avoid hazardous duty or to shirk important service.[29] A more unusual form of desertion occurs when an officer leaves his or her post or duties prior to acceptance of his or her tendered resignation.[30] All three offenses require proof of a specific intent element that can be established through circumstantial evidence.

Proof of an intent to remain away permanently from the unit, organization, or place of duty is required for the most common form of desertion. This "intent need not exist throughout the absence, or for any particular period of time, as long as it exists at some time during the absence."[31] Numerous circumstances will establish the intent to remain away permanently element, including statements by the accused; evidence that the accused attempted to, or did, destroy or dispose of military uniforms or identification documents; or evidence "that the accused purchased a ticket for a distant point or was arrested, apprehended, or surrendered a considerable distance from the accused's station."[32]

Proof of an intent to avoid hazardous duty or to shirk important service is required for the second most common form of desertion. "Hazardous duty" or "important service" may include a variety of duties and is not limited to combat solely. Hazardous duty or important service can include "embarkation for certain foreign or sea duty; movement to a port of embarkation for that purpose;" as well as other duties. Ordinarily practice marches, drills, or maneuvers are not considered hazardous duty or important service.[33]

None of the offenses mentions a specific time period after which an absence without leave becomes a desertion.[34] Like-

---

[25] *Id.*

[26] *Armstrong,* 36 M.J. at 313.

[27] 36 M.J. 468 (C.M.A. 1993).

[28] UCMJ art. 85 (1988).

[29] *Id.* 85(a)(1),(2).

[30] *Id.* 85(a)(3).

[31] MCM, *supra* note 9, pt. IV, para. 9c(1)(c)(i).

[32] *Id.* para. 9c(1)(c)(iii).

[33] *Id.* para. 9c(2)(a).

[34] Prior to the *Thun* decision, an argument could have been made that "the accused remained absent until the date alleged" element implied that an absence of less than 24 hours could not be considered a desertion. *Thun,* however, clearly precludes such an argument.

wise, the offenses do not require proof of an absence of any minimum duration for a conviction.[35] Arguing that a very brief desertion constitutes no more than an attempt may be less helpful to the accused than the same argument would be with a different offense because the maximum punishments for the attempt and the completed act of desertion are identical.[36] Furthermore, desertion is exempted specifically from the UCMJ's limits on penalties for attempts.[37]

The Case of United States v. Thun

The accused, Specialist Thun, was absent from his unit for three hours and fifteen minutes on the day his unit was to deploy to Saudi Arabia to participate in Operation Desert Storm.[38] His absence was noted first at a weigh-in for the soldiers' packed bags immediately prior to the scheduled deployment. No one had given him permission to be absent from this weigh-in.

Evidence at trial established that Specialist Thun had been informed of the unit's deployment to Saudi Arabia several weeks prior to the scheduled movement. The accused and his unit had been informed of the danger and importance of their military duty on the upcoming mission. In addition, he had been informed on the day prior to deployment that the unit would deploy the next day. Finally, it was established at trial that for several weeks prior to his disappearance, the accused had "repeatedly made statements indicating that he did not want to be part of such a mission and that he thought that the whole effort was a misguided war over oil." [39]

In finding that the accused's absence amounted to desertion, the COMA focused on the imminence of the overseas duty and the accused's knowledge of that duty. Acknowledging that the accused's absence was "unusually short for a charge of desertion," the COMA nevertheless found, "it is not the *duration* of the absence that is telling, but its *timing*."[40]

This result might seem to be surprising in view of the COMA's opinion in *United States v. McCrary*.[41] In *McCrary*, the COMA wrote, in dicta, that a very brief absence could undermine an inference of intent to desert. Additionally, in *United States v. Cothern*, the COMA refused to find that a prolonged absence, without more, was sufficient to support a finding of intent to desert.[42] Those cases, however, involved desertion when the intent was to remain away permanently while *Thun* involved desertion with the intent to avoid hazardous duty or to shirk important service. *Thun* clearly indicates that the duration of the absence is not a deciding factor when the accused is charged with desertion with intent to avoid hazardous duty or to shirk important service and he has knowledge of that duty or service.

Conclusion

Trial counsel should consider *Thun* when charging desertion cases, particularly when the facts justify charging under either theory set out above. Based on *Thun*, when the accused is charged with desertion with the intent to avoid hazardous duty or to shirk important service, even a brief absence could serve to support a conviction if the government can prove the accused had knowledge of the duty. Alternatively, if the accused is charged with desertion with the intent to remain away permanently, a brief absence probably will work to the disadvantage of the government because it supports an inference that no intent to remain away permanently existed. Mr. Baker, Summer Intern.

Finsel Provides an Example of Obstruction of Justice

Introduction

Although most criminals wish to avoid detection and may take steps to avoid being discovered or caught, not all who do so will be found to have committed the offense of obstructing justice.[43] The COMA's recent decision in *United States v.*

---

[35] UCMJ art. 85(b)(1), (b)(3), (b)(4) (1988). A "prompt repentance and return, while material in extenuation, is no defense." MCM, *supra* note 9, pt. IV, ¶ 9(c)(1)(a).

[36] MCM, *supra* note 9, pt. IV, ¶ 9e. In time of war, the available range of punishments includes death.

[37] *Id.* pt. IV, ¶ 4c(5), ¶ 4e.

[38] United States v. Thun, 36 M.J. 468 (C.M.A. 1993).

[39] *Id.* at 469.

[40] *Id.*

[41] The longer the absence and the greater the distance from the unit the more reasonable the inference [of intent to desert]. The shorter the time and distance the less the inference is bottomed on reason. It is almost impossible to fix with certainty the minimum and maximum limits of these factors . . . ."

United States v. McCrary, 1 C.M.R. 1, 6 (C.M.A 1951).

[42] 23 C.M.R. 382 (C.M.A. 1957).

[43] *See* UCMJ art. 134 (1988). The elements of the offense of obstruction of justice are as follows:

(1) That the accused wrongfully did a certain act;

(2) That the accused did so in the case of a certain person against whom the accused had reason to believe there were or would be criminal proceedings pending;

(3) That the act was done with the intent to influence, impede, or otherwise obstruct the due administration of justice; and

(4) That, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit on the armed forces.

MCM, *supra* note 9, pt. IV, ¶ 96b.

Finsel[44] provides a useful illustration of how courts may draw "the line separating the end of the principal offense and the beginning of the obstruction of justice."[45] While this line "is often very difficult to discern,"[46] the facts in *Finsel* established a finding of obstruction of justice. Nevertheless, the COMA cautions that "each offense must be resolved on a case-by-case-basis, considering the facts and circumstances surrounding the alleged obstruction and the time of its occurrence with respect to the administration of justice."[47]

Obstruction of Justice

As discussed below, prior to *Finsel,* the following cases have elaborated on the main elements of the offense of obstruction of justice.

That the Accused Wrongfully Committed a Certain Act

The word "wrongfully" has been held to require that an accused's act be "done without legal right or with some sinister purpose."[48] One accused's request that his victim not report his obscene phone calls—when no affirmative duty to report such crime exists—is not wrongful and therefore, not an obstruction of justice.[49] In contrast, another accused's request that witnesses to a hit and run incident lie about it to police if questioned is wrongful and is an obstruction of justice.[50]

Determining whether an action is wrongful can be highly contextual. For example, the COMA found it "doubtful" that an accused in Korea could be found to have obstructed justice when he paid money to an alleged rape victim to keep her from pressing charges in a Korean court. The COMA reached this result because the practice was "legal and customary" in Korea.[51] Also, protecting "servicemembers from trial in an unfamiliar legal system, where they will understand neither the language nor the procedure," is not a "sinister" purpose.[52] Finally, it is American national policy "that, insofar as practicable, our military personnel should be tried by courts-martial rather than by courts of a host country."[53]

That the Accused Wrongfully Acted in the Case of a Certain Person Against Whom the Accused had Reason to Believe There Were or Would be Criminal Proceedings Pending

The need for pending criminal proceedings was addressed definitively in *United States v. Jones.*[54] The COMA decided that the accused obstructed justice when he grabbed some heroin that officers had just found in a "health and welfare inspection" of his room, and flushed it down a toilet. The accused argued obstruction of justice was not possible absent a pending judicial proceeding. The accused argued that he could not be convicted because no such proceeding was pending at the time of the inspection. The COMA disagreed.[55] It held "[t]he impact of such conduct is equally pernicious whether or not formal charges are pending. To hold otherwise would permit . . . those who were alert enough to act immediately before formal process began [to] be insulated from dire consequences for their perverse conduct. This we cannot allow."[56]

The accused in *Jones* destroyed evidence that already had been discovered in the course of an administrative inspection. In *United States v. Turner,*[57] the COMA held that

[44] 36 M.J. 441 (C.M.A. 1993).

[45] *Id.* at 443.

[46] *Id.*

[47] *Id.*

[48] United States v. Asfeld, 30 M.J. 917, 928 (A.C.M.R. 1990).

[49] *Id.* at 928.

[50] United States v. Guerrero, 28 M.J. 223, 226 (C.M.A. 1989); *see also* United States v. Tedder, 24 M.J. 176 (C.M.A. 1987) (accused officer obstructed justice when he told the enlisted woman with whom he was fraternizing to mislead Naval Investigative Service agents should they question her).

[51] United States v. Jensen, 25 M.J. 284, 288 (C.M.A. 1987).

[52] *Id.*

[53] *Id.*

[54] 20 M.J. 38 (C.M.A. 1985).

[55] The accused's argument was based on the assertion that the military offense of obstruction of justice was "derived from" a federal offense that required a judicial proceeding to be pending. The COMA "held that the facial similarity of a military offense with a Federal crime does not mean that courts-martial are limited to prosecuting servicemembers [for only the federal offense] under clause (3) of Article 134". *Id.* at 39.

[56] *Id.* at 40 (citations omitted).

[57] 33 M.J. 40 (C.M.A. 1991).

obstruction of justice did not occur when the accused attempted to *prevent* discovery of criminal evidence during an administrative inspection. The accused substituted toilet bowl water for her own urine specimen. The ACMR found this act was "intended . . . to thwart the possibility of military justice action" and, therefore, constituted an obstruction of justice.[58] The COMA reversed, finding an inspection, unlike a search, is not "made in anticipation of prosecution."[59] Accordingly, interference in an inspection, unlike interference in a search, does not constitute obstruction of justice.[60]

Likewise, the Navy-Marine Corps Court of Military Review (NMCMR) did not find obstruction of justice in *United States v. Armstead.*[61] The accused in *Armstead* substituted his son's urine for his own in an administrative inspection, concealing his recent cocaine use. The NMCMR held such concealment was not obstruction of justice because the evidence concealed could not be used for criminal purposes after the accused's earlier voluntary disclosure of his drug use to command authorities. Therefore, at the time of the act "no such criminal proceeding existed, was contemplated, nor could be contemplated."[62]

That the Act Was Done with the Intent to Influence, Impede, or Otherwise Obstruct the Due Administration of Justice

In a rather bizarre case, *United States v. Athey*,[63] the COMA found no obstruction of justice when this element was not met. Because the accused was unaware of the investigation against him, he was incapable of intending to obstruct the investigation. Incredibly, the accused himself had brought his wrongdoing—indecent acts—to the attention of the criminal investigation division in the form of an anonymous letter that he represented as a hoax to be investigated.[64] Even though the accused was aware that an investigation was taking place, he did not realize he was the "certain person"—the second element of the obstruction of justice offense—upon whom the investigation was focused. The accused believed that the criminal investigation was aimed at the letter writer. Therefore, when he instructed the woman on whom he had committed the acts to deny them to investigators, he did not realize he was obstructing an investigation of himself.[65] "Someone who never foresees that a criminal proceeding may take place cannot intend to obstruct it . . . . Thus, his ignorance of peril ironically becomes a matter of defense."[66]

The Case of United States v. Finsel

The facts of *Finsel* arose in January of 1990 when the accused and two other soldiers obtained permission to leave their command post area in Panama City, Panama, on the pretext of going to dinner at a nearby McDonald's restaurant. Instead, they went to a bar to drink alcohol and to engage the services of a prostitute. While in the bar, the accused negligently lost the company commander's 9mm pistol, which had been loaned to him for the ostensible outing to McDonald's. The three soldiers decided to stage a "firefight" in order to cover up their unauthorized visit to the bar and negligent handling of the pistol. They began shooting their rifles into the air. Reinforcements arrived, and more shooting followed. A Panamanian bystander was killed. When the shooting was over, the accused declared that he had lost the pistol in the fight.[67]

Quoting from the ACMR's opinion in the case of one codefendant,[68] the COMA found that instigating the firefight amounted to obstruction of justice. As in *Jones,* no criminal proceedings had yet begun, but the accused

> knew that a criminal investigation was not only possible, but highly probable . . . . In order to prevent the anticipated official inquiry from being initiated, the appellant and his cohorts did more than passively conceal the events that transpired . . . . They also conspired to divert attention from their misconduct by actively attempting to pre-

[58] United States v. Turner, 30 M.J. 984, 986 (A.C.M.R. 1990).

[59] *Turner,* 33 M.J. at 41.

[60] *Id.* at 43. Such "conduct can best be termed as willful disobedience of an order, in violation of Article 92, UCMJ." *Id.*

[61] 32 M.J. 1013 (N.M.C.M.R. 1991).

[62] *Id.* at 1015.

[63] 34 M.J. 44 (C.M.A. 1992).

[64] *Id.* at 45.

[65] *Id.* at 48.

[66] *Id.* at 49.

[67] United States v. Finsel, 36 M.J. 441, 442-43 (C.M.A. 1993).

[68] United States v. Gussen, 33 M.J. 736, 739 (A.C.M.R. 1991).

> vent what they believed, with good reason, would be a criminal investigation. We hold these facts sufficient to demonstrate subversion or corruption of the administration of justice.[69]

In agreeing with this conclusion, the COMA found adequate evidence available for a reasonable factfinder to conclude beyond a reasonable doubt that the accused "had reason to believe that there were or would be criminal proceedings against him," and that he acted "with the intent to influence, impede, or otherwise obstruct the due administration of justice."[70]

Conclusion

In *Athey*, the accused did not believe that criminal proceedings were or would be pending and consequently, was incapable of forming the intent to obstruct them. In *Jones,* the accused was well aware that, although criminal proceedings had not yet begun, they were inevitable. Likewise, in *Finsel,* the accused knew that his misdeeds were bound to be discovered unless he took active steps to divert attention from these misdeeds. Therefore, the intentional instigation of the firefight was obstruction of justice.

When prosecuting an obstruction of justice case, trial counsel should consider that *Finsel* emphasizes the importance of intent and knowledge. In cases involving the accused's activities before criminal proceedings begin, trial counsel must establish that the accused knew such proceedings were likely and acted wrongfully in order to frustrate them. Mr. Baker, Summer Intern.

The COMA Finds that *Jacobson* Does Not Greatly Expand the Entrapment Defense

Introduction

When the United States Supreme Court announced its decision in *Jacobson v. United States*[71] last year, there was concern—some of it expressed by the dissenting justices—that the case would be a crippling blow to criminal investigators and prosecutors. In *Jacobson,* the Court threw out a criminal conviction that was based on the defendant's ordering child pornography in response to advertisements mailed to him by government agents. The Court held that the defendant had been entrapped.

Critics argued that the decision seriously could undermine future undercover sting operations. The recent COMA case of *United States v. Tatum,*[72] however, suggests that *Jacobson* may not affect adversely such undercover operations after all.

Entrapment

The defense of entrapment consists of two elements. First, the government must have induced a criminal act on the part of the defendant. Second, the defendant must not have been predisposed to commit the crime.[73] The COMA explained in *United States v. Howell*:[74]

> To raise the defense a defendant must produce evidence of both the Government's inducement and his own lack of predisposition. Once a defendant accomplishes this, the burden shifts to the government to prove beyond a reasonable doubt that the defendant was predisposed or that there was no government inducement.
>
> . . . .
>
> Inducement is governmental conduct that creates a substantial risk that an undisposed person or an otherwise law-abiding citizen would commit the offense. Inducement may take different forms, including pressure, assurances that a person is not doing anything wrong, persuasion, fraudulent representations, coercive tactics, harassment, promises of reward, or pleas based on need, sympathy, or friendship. Inducement cannot be shown if government agents merely provide the opportunity or facilities to commit the crime or use artifice or stratagem.[75]

Sorrells v. United States,[76] a Prohibition-era liquor case, is an early example of the Supreme Court finding inducement

---

[69] *Finsel*, 36 M.J. at 444.

[70] *Id.* at 445.

[71] Jacobson v. United States, 112 S. Ct. 1535 (1992).

[72] 36 M.J. 302 (C.M.A. 1993).

[73] MCM, *supra* note 9, R.C.M. 916(g).

[74] 36 M.J. 354 (C.M.A. 1993).

[75] *Id.* at 359-60 (citations omitted).

[76] 287 U.S. 435 (1932).

and overturning a conviction because of entrapment. In *Sorrells,* the defendant, a World War I veteran, refused several requests for whiskey from an undercover agent who also was a veteran. Only when the agent "succeeded [in] taking advantage of the sentiment aroused by reminiscences of their [similar] experiences as companions in arms" did the defendant finally leave the scene to procure some liquor.[77] In a later case, *Sherman v. United States*,[78] the Court found that government manipulation of the suspect's sympathy also was a form of inducement giving rise to a defense of entrapment. In *Sherman*, a government informant overcame a suspect's unwillingness to obtain illegal drugs for him by pretending to be in the agonies of withdrawal.

The Case of Jacobson v. United States

In *Jacobson,* the Supreme Court found that inducement had occurred and held that the government had failed to meet its burden of showing beyond a reasonable doubt that the defendant had been predisposed to commit the crime. The Court further suggested that the government's method of investigation had muddied the waters as to this issue by possibly creating a predisposition that had not been there previously.

The impact of *Jacobson* on police activity is likely to be slight because of its extremely unusual facts. In 1984, the defendant placed a mail order for two child pornographic magazines[79] with a bookstore in another state. Such transactions were legal at the time, but were outlawed shortly thereafter.[80] When postal inspectors found the defendant's name on the bookstore's mailing list after the change in the law, he became the target of twenty-six months of "repeated efforts by two government agencies, through five fictitious organizations and a fictitious pen pal, to explore [his] willingness to break the new law."[81] Some of the government mailings had political overtones, urging the defendant to believe that the law was unjust and unfair. One mailing called the new child pornography law a violation of rights and an example of "outdated puritan morality;" another described it as an "arbitrarily imposed legislative sanction[] restricting *your* sexual freedom [which] should be rescinded through the legislative process;" and a third referred to the "hysterical nonsense" about and "international censorship" of child pornography.[82]

Other government mailings simply were blatant advertisements for child pornography. At long last, according to the Court, "[t]he Government had succeeded in piquing his curiosity," and the defendant placed an order.[83] When the defendant was arrested on receiving delivery, a search of his home turned up the two legally purchased magazines and the government mailings, "but no other materials that would indicate that [he] collected or was actively interested in child pornography."[84]

In light of these facts, the *Jacobson* majority found that rational jurors could not have found beyond a reasonable doubt that the defendant had been predisposed to order child pornographic materials through the mail. They were precluded from doing so by

> the strong arguable inference . . . that, by waving the banner of individual rights and disparaging the legitimacy and constitutionality of efforts to restrict the availability of sexually explicit materials, the Government not only excited petitioner's interest in sexually explicit materials banned by law but also exerted substantial pressure on petitioner to obtain and read such material as part of a fight against censorship and the infringement of individual rights.[85]

The one piece of evidence that was unrelated to this government activity, the original legal purchase of two child pornographic magazines, also was found to be insufficient to establish predisposition.

---

[77] *Id.* at 441.

[78] 356 U.S. 369 (1958).

[79] The titles of the magazines were *Bare Boys I* and *Bare Boys II*. The defendant testified that he had expected the magazines to portray "young men 18 years or older" and that on receiving the magazines he was "shocked and surprised" to learn that the "Boys" were actually teenagers and children.

[80] See 18 U.S.C. § 2552(a)(2)(A) (1984).

[81] Jacobson v. United States, 112 S. Ct. 1535, 1538 (1992).

[82] *Id.* at 1538-39.

[83] *Id.* at 1540. The dissent points out that the accused actually placed two orders, supporting the view that he was predisposed to commit the offense. *Id.* at 1543 (O'Connor, J., dissenting). One of the orders, however, was neither filled nor acted on by the government, and it occurred at approximately the same time—26 months into the investigation—as the purchase for which the accused was arrested. Perhaps for these reasons, the majority makes only a brief passing reference to this purchase order. *Id.* at 1539. In any event, the order appears to have played no significant role in the majority's decision.

[84] *Id.* at 1540.

[85] *Id.* at 1542.

> Evidence of predisposition to do what once was lawful is not, by itself, sufficient to show predisposition to do what is now illegal, for there is a common understanding that most people obey the law even when they disapprove of it. This obedience may reflect a generalized respect for legality or the fear of prosecution, but for whatever reason, the law's prohibitions are matters of consequence.[86]

The dissenting opinion in *Jacobson* argued that the decision negatively would affect prosecutions of suspects detected through undercover sting operations in the future.

> The Court denies that its new rul[ing] will affect run-of-the-mill sting operations . . . and one hopes that it means what it says. Nonetheless . . . the Court's opinion could be read to prohibit the Government from advertising the seducti[ve qualities] of criminal activity as part of its sting operation[s] . . . . That limitation would be especially likely to hamper sting operations such as this one, which mimic the advertising done by genuine purveyors of pornography.[87]

The recent decision of the COMA in *Tatum* seems to lay these fears to rest.

The Case of United States v. Tatum

United States v. Tatum, the first entrapment case decided by the COMA after *Jacobson*, involved the very same offense: purchasing child pornography through the mail. The facts of the case began to unfold when United States Customs agents and postal inspectors launched Operation Circe,[88] a sting operation aimed at exposing and prosecuting individuals who were in the market for child pornography. As part of the operation, the following advertisement, consisting only of text, was placed in a sex magazine called "Swingers Digest":

> V.H.S. VIDEOS
> QUALITY VHS VIDEOS FOR SALE.
> BIZARRE AND UNUSUAL.
> SEND $1.00 FOR LISTING AND PRICES TO
> BAUMC, P.O. BOX1772, APTOS, CA 95001[89]

The defendant mailed one dollar to the address given, and soon received "Tots and Teens," a catalog of pornographic movies on videotape in which each title was described as portraying children between the ages of ten and sixteen engaged in sexual activity. The defendant, an Air Force Technical Sergeant, ordered three movies for a total of $125.00. He was arrested on receiving delivery of the movies from a federal agent disguised as a Federal Express employee. The defendant mounted an entrapment defense.[90]

The COMA found that the defendant had not been entrapped.[91] The COMA pointed out that the federal agents merely had afforded the accused an opportunity to commit a crime, which long has been a recognized and legitimate law enforcement technique.[92] Therefore, no government inducement existed. Additionally, no question existed as to the defendant's predisposition to commit the crime because "[a]t all points after the initial advertisement—the mere opportunity to commit criminal activity—all contact with appellant was initiated by appellant himself."[93]

Conclusion

Though *Jacobson* may have appeared to expand the defense of entrapment, *Tatum* shows that any change is minimal. *Tatum*, citing *Jacobson*, shows that in ordinary sting operations when the government merely offers the opportunity to commit a crime, "the entrapment defense is of little use because the ready commission of the criminal act amply demonstrates the defendant's predisposition." Such operations include offers to buy or sell drugs, offers to buy or sell child pornography, and even "more elaborate 'sting' operation[s] involving government-sponsored fencing."[94]

---

[86] *Id.*

[87] *Id.* at 1545 (O'Connor, J., dissenting).

[88] In Greek mythology, Circe was a sorceress who turned men into swine. WEBSTER'S NEW COLLEGIATE DICTIONARY 241 (9th ed. 1990).

[89] United States v. Tatum, 36 M.J. 302, 303 (C.M.A. 1993).

[90] *Id.*

[91] *Id.* at 305.

[92] *Id.* at 304. The COMA cites a line of cases stretching back to *Sorrells* in 1932, but recognition of the legitimacy of this sort of police work is much older. The Supreme Court's first entrapment-like case apparently occurred in 1895, when a defendant who had agreed to sell an undercover postal inspector wholesale quantities of "fancy photographs" of "actresses" argued that he should not have been convicted because he had committed the crime at the request of a government agent. The Court rejected this argument because "[T]he purpose of the post office inspector [was not] to induce or solicit the commission of a crime, but it was to *ascertain* whether the defendant was engaged in an unlawful business." Grimm v. United States, 156 U.S. 604, 606, 607 (1895) (emphasis added).

[93] *Tatum*, 36 M.J. at 305.

[94] *Id.* at 304 (citing *Jacobson*, 112 S. Ct. at 1541).

Three major factors distinguished *Jacobson* from an ordinary sting operation. One was the politicized nature of some of the government's contact with the defendant. Another was the unusually long period over which repeated and varied contacts, appearing to be from numerous sources, were initiated by the government before the defendant finally committed the violation for which he was arrested. The third, in light of the legality of the defendant's earlier purchase of child pornography, was a lack of evidence of predisposition. These factors led to the success of the entrapment defense in *Jacobson.* Mr. Baker, Summer Intern.

In *United States v. Greene,* the COMA Draws a Firm Line on Racially Discriminatory Peremptory Challenges

Introduction

In *United States v. Greene,*[95] the COMA made clear that it will strictly enforce the prohibition against racially motivated peremptory challenges of court martial members. In *Greene,* trial counsel challenged a black member in the rape and sodomy trial of a black defendant because that member grew up in Panama. Trial counsel assumed that the member would have "the Latin macho type of attitude" about sex and sexual offenses.[96] This assumption was based on trial counsel's experience with Panamanian men other than the member and was not based on anything that the member said or did at *voir dire.*[97] However, trial counsel's opinion of Panamanian men was only one of two grounds used to challenge the member. The other reason was racially neutral.[98]

The court in *Greene* found that racially motivated peremptory challenges are unacceptable even when based on assumptions or judgments about a race or ethnic group to which the accused does not belong.[99] Furthermore, the reasons for a peremptory challenge must be "untainted" by racial considerations. If one of several reasons for a challenge is racially discriminatory, the challenge remains invalid even if the other reasons are racially neutral.[100]

Race and Jury Selection

In *Strauder v. West Virginia*[101] in 1880, the United States Supreme Court decided that a state law prohibiting anyone but white males from serving on juries violated the Fourteenth Amendment Equal Protection rights of a black defendant. The Court stressed it was not deciding that a black defendant had a right to be tried by a jury composed in whole or in part of members of his or her own race, but only that such a defendant had a right to be tried by a jury from which such members had not been "excluded by law."[102]

Although the law could not exclude blacks from the venire, peremptory strikes by prosecutors could prevent blacks from reaching the jury box. The Court decided in *Swain v. Alabama*[103] in 1965 that peremptory strikes would not be allowed to accomplish what statutes were forbidden to do. Unfortunately for minority defendants and prospective jurors,[104] this new rule had no teeth. Local law could "insulate from inquiry" challenges by a prosecutor "in any particular case."[105] As a result, a defendant could establish a prima facie case of racial discrimination only by showing a persistent pattern of minority exclusion "in case after case . . . with the result that no Negroes ever serve on petit juries."[106]

---

[95] 36 M.J. 274 (C.M.A. 1993).

[96] *Id.* at 277.

[97] *Id.* at 277, 279.

[98] During *voir dire,* trial counsel had asked the member about his flexibility on the issue of punishment, and the member's responses led to more questions and instructions from the military judge. Trial counsel told the judge that he sought to challenge the member in part because "he may hold it against me as the government representative for having put him in that position, where he had to cover ground and listen to the instructions that you gave him. Going over all that with him again." *Id.* at 277.

[99] *Id.* at 278-79; *see also id.* at 283 (Wiss, J., concurring).

[100] *Id.* at 281.

[101] 100 U.S. 303 (1880).

[102] *Id.* at 305-06.

[103] 380 U.S. 202 (1965).

[104] Supreme Court case law has articulated that the rights of the *juror* are harmed as much as the rights of the defendant by racially discriminatory jury selection.

> Competence to serve as a juror ultimately depends on an assessment of individual qualifications and ability to impartially consider the evidence presented at trial. A person's race is simply unrelated to his fitness as a juror. . . . [B]y denying a person participation in jury service on account of his race, the State unconstitutionally discriminated against the excluded juror.

Batson v. Kentucky, 476 U.S. 79, 87, (1986) (citations omitted); *see infra* note 128.

[105] *Swain,* 380 U.S. at 223-24 (1965).

[106] *Id.*

In *Batson v. Kentucky*[107] in 1986, the Supreme Court found that *Swain*'s requirement for a defendant to show a persistent pattern in order to establish a prima facie case of racial discrimination was a "crippling burden of proof."[108] Few defendants were able to meet this burden.[109] In throwing out the rule from *Swain*, the Court also found that "evidentiary requirements [that] dictate that 'several must suffer discrimination' before one could object would be inconsistent with the promise of equal protection for all."[110]

In *Batson*, the Court was less deferential to prosecutors and provided minority defendants with a somewhat invigorated method of resisting the discriminatory exclusion of minority jurors. The defendant must show that he or she is a member of a "cognizable racial group" and that the prosecutor has used peremptory strikes to remove members of that group from the venire. This, in light of "the fact . . . that peremptory challenges constitute a jury selection practice that permits 'those to discriminate who are of a mind to discriminate'. . . raises the necessary inference of purposeful discrimination."[111]

Then, the judge must determine if, under the circumstances, a prima facie showing of purposeful discrimination has been made.[112] If so, the burden shifts to the government to come forward with "a neutral explanation" for challenging minority jurors. "[T]he prosecutor's explanation need not rise to the level justifying exercise of a challenge for cause."[113] Still, the explanation must be more than a mere assertion of good faith or denial of discriminatory intent and must not be based on any "assumptions which arise solely from the juror's race."[114]

In *United States v. Santiago-Davila*,[115] the COMA decided that *Batson* applied in military as well as civilian courts. "This right to equal protection is a part of due process under the Fifth Amendment and so it applies to courts-martial just as it does to civilian juries."[116] In a later decision, *United States v. Moore*,[117] the COMA streamlined the *Batson* response to possible racial prejudice in military courts. "Upon the Government's use of a peremptory challenge against a member of the accused's race and upon timely objection," a prima facie case of discrimination is established per se and "trial counsel must give his [or her] reasons for the challenge." The trial judge must be satisfied that the explanation for the peremptory challenge is racially neutral.[118]

More recently, in *Powers v. Ohio*,[119] a white defendant objected to the exclusion of black jurors. The Supreme Court held "that a criminal defendant may object to race-based exclusions of jurors effected through peremptory challenges whether or not the defendant and the excluded juror share the same race."[120] The Court, however, stopped short of saying that *Batson*'s establishment of a prima facie case of discrimination must be applied in such circumstances.[121]

---

[107] *Batson*, 476 U.S. at 79 (1986).

[108] *Id.* at 92.

[109] Justice Marshall wrote in his concurring opinion, "Misuse of the peremptory challenge to exclude black jurors has become both common and flagrant. Black defendants rarely have been able to compile statistics showing the extent of that practice [as required by *Swain*], but the few cases setting out such figures are instructive." He then cited studies made in preparation for those cases, showing that 81% of black jurors were peremptorily stricken in the Western District of Missouri; that 82% of black jurors were peremptorily stricken in a county in South Carolina; that 68.9% of peremptory strikes were used against blacks in the Eastern District of Louisiana, where blacks made up less than 25% of the venire; and that 405 of 467 eligible blacks were peremptorily stricken in Dallas, Texas, with the result that a qualified white in that city was five times as likely as a qualified black to sit on a jury. *Id.* at 103-04, 106 (Marshall, J., concurring).

[110] *Id.*, 476 U.S. at 96. "The Court's opinion . . . ably demonstrates the inadequacy of any burden of proof for racially discriminatory use of peremptories that requires that 'justice . . . sit supinely by' and be flouted in case after case before a remedy is available." *Id.*, 476 U.S. at 102 (Marshall, J., concurring) (citation omitted).

[111] *Id.* at 79, 96.

[112] *Id.* at 96-97.

[113] *Id.* at 97.

[114] *Id.* at 97-98.

[115] 26 M.J. 380 (C.M.A. 1988).

[116] *Id.* at 390.

[117] 28 M.J. 366 (C.M.A. 1989).

[118] *Id.* at 368.

[119] 111 S. Ct. 1364 (1991).

[120] *Id.* at 1366.

[121] "It remains for the trial courts to develop rules . . . to permit legitimate and well-founded objections to the use of peremptory challenges as a mask for race prejudice." *Id.* at 1374.

The Case of United States v. Greene[122]

The issues in *Greene* centered on the trial judge's determination of whether the peremptory challenge of a member of the accused's "cognizable racial group" was racially neutral. In *Greene*, the challenged member was arguably a member of two racial groups, black and Panamanian.[123] The accused also was black, but the member was challenged for discriminatory reasons related to the member being Panamanian.[124] An additional problem arose because trial counsel offered two explanations for the peremptory challenge. One was racially neutral; the other was not.[125]

The COMA disposed of the issue of multiple ethnicity by citing a United States Supreme Court interpretation of *Batson* that defined "a neutral explanation [as] *an explanation based on something other than the race of the juror.*"[126] At this stage of *Batson* analysis—with the focus on the race of the juror—that the juror's racial identity may not be the same as that of the accused is irrelevant. Therefore, trial counsel's attempt to strike a Panamanian member from a sex crime trial because of the alleged "Latin macho type of attitude"[127] of other Panamanians will fail even when the defendant is not Panamanian.[128] The explanation is not racially neutral.

Trial counsel's other explanation for the peremptory challenge was racially neutral.[129] This presented the issue of whether one racially neutral explanation would suffice to support a challenge when another explanation was not racially neutral. The COMA held "that an explanation, which includes 'in part' a reason, criterion, or basis that patently demonstrates an inherent discriminatory intent cannot reasonably be deemed race neutral."[130] The COMA noted that although the circuit courts were divided on the issue, most that had considered the issue had decided that "every reason or basis" of multiple explanations must be reviewed for racial bias.[131] The existence of one or more racially neutral reasons would not validate a challenge that otherwise was tainted by racial considerations. Because one of trial counsel's two stated reasons for the peremptory challenge was not racially neutral, the court set aside the findings of guilty and the sentence, and ruled that a rehearing might be ordered.[132]

Conclusion

Through *Swain*, *Batson,* and *Moore*, establishing a *prima facie* case of racial discrimination in the use of peremptory challenges has become progressively easier. When a minority accused makes a timely objection to trial counsel's peremptory challenge of another member of his racial group, the prima facie case is established and trial counsel must explain his or her reasons for the challenge. *Powers* shows that it is also possible for an accused who is not a member of the excluded juror's racial group to object to apparent racial discrimination in the use of peremptory challenges.

The lesson of *Greene* is that, once the prima facie case is established, a trial counsel's explanation of the reasons for the peremptory challenge must be completely free from *any* racial bias. Discrimination against a racial group of which the accused is not a member is unacceptable. Racial discrimination together with otherwise valid reasons for a peremptory challenge also is unacceptable. "[A]ll the reasons proffered by trial counsel [must] be untainted by any inherently discriminatory motives."[133] Mr. Baker, Summer Intern.

---

[122] 36 M.J. 274 (C.M.A. 1993).

[123] The court refrained from deciding "whether an individual from the Republic of Panama is a member of a cognizable racial group." *Id.* at 279 n.5.

[124] *Id.* at 277.

[125] *Id.* at 279. *See supra* note 98.

[126] *Id.* at 279 (citing Hernandez v. New York, 111 S. Ct. 1859, 1866 (1991)) (emphasis added by Court of Military Appeals).

[127] *Id.* at 278.

[128] *Id.* at 279. In *Powers*, the Supreme Court found that "[t]o bar petitioner's claim because his race differs from that of the excluded jurors would be to condone the arbitrary exclusion of citizens from the duty, honor, and privilege of jury service." Powers v. Ohio, 111 S. Ct. 1364, 1373 (1991).

[129] *See supra* note 98.

[130] *Greene*, 36 M.J. at 281.

[131] The court listed the following circuit cases as supporting its "untainted approach": Williams v. Chrans, 957 F.2d 487 (7th Cir.1992); United States v. Clemons, 941 F.2d 321, 325 (5th Cir.1991); United States v. Alcantar, 897 F.2d 436 (9th Cir.1990); and United States v. Thompson, 827 F.2d 1254, 1260 (9th Cir.1987). *Alcantar* and *Thompson* went beyond the COMA in calling for an adversarial hearing to determine the prosecution's true motive. One adverse case, United States v. Iron Moccasin, 878 F.2d 226, 229 (8th Cir. 1989), also was mentioned. In that case, "multiple reasons offered by prosecutor [were] treated as three distinct explanations, with acceptance of one removing the necessity to look at the others." *Greene*, 36 M.J. at 281.

[132] *Id.* at 282.

[133] *Id.* at 280.

Legal Assistance Items

The following notes have been prepared to advise legal assistance attorneys of current developments in the law and in legal assistance program policies. They also can be adapted for use as locally-published preventive law articles to alert soldiers and their families about legal problems and changes in the law. We welcome articles and notes for inclusion in this portion of *The Army Lawyer;* send submissions to The Judge Advocate General's School, ATTN: JAGS-ADA-LA, Charlottesville, VA 22903-1781.

Family Law Note

Professional Responsibility Considerations

This summary of ethical considerations highlights several areas where legal assistance providers should exercise special caution when providing divorce or separation counseling.[134] Lieutenant Colonel Hancock.

Representing Both Parties

Rule 1.7 of the Army *Rules of Professional Conduct for Lawyers*[135] (*Army Rules*) generally prohibits a lawyer from representing a client in a matter adversely affecting the interests of another client, even if wholly unrelated to the subject of the client's representation. Applied to the divorce or separation context, this means a legal assistance provider should not represent both spouses in negotiating a separation agreement or initiating a divorce, even when a full disclosure and agreement between the parties exists.[136]

When counseling a client about divorce or separation, legal assistance practitioners should discuss estate planning considerations only with the client. The client may desire to change his or her will, power of attorney, or other estate planning document when contemplating a separation or divorce. The legal assistance provider should provide only the client—and not the spouse—with appropriate advice and assistance on such matters. If the spouses reconcile and subsequently desire assistance in preparing new estate planning documents, the legal assistance provider should review *Army Rules* 1.6 and 1.7 before proceeding to assist both spouses. Instead of representing both spouses, another legal assistance provider should assist the other spouse.[137]

Even in a nondivorce situation, legal assistance providers should exercise special caution when counseling both spouses on estate planning matters—that is, wills—particularly if the spouses propose conflicting property dispositions, desire to name different guardians, or evidence indicates that the marriage is unstable.[138]

Occasionally, lawyers serve as intermediaries, such as mediators or arbitrators. *Army Rule* 2.2 recognizes that lawyers may act as mediators. Lawyers who do so should be thoroughly familiar with *Army Rule* 2.2 and its comment. When conducting mediation, lawyers do not have an attorney-client relationship with either side. Therefore, no attorney-client privilege or confidentiality exists and the legal assistance provider must be impartial. Furthermore, legal assistance providers should not attempt to mediate where they previously have formed an attorney-client relationship with one side or the other.

Two Members of the Same Legal Office Representing Opposing Parties

Imputed disqualification does not apply automatically to Army lawyers.[139] Two legal assistance providers working in the same office are not disqualified automatically from representing conflicting parties to a dispute. *Army Rule* 1.10 recognizes that military service may require representation of opposing sides by Army lawyers working in the same legal office. The comment to this rule further provides that "[s]uch representation is permissible so long as conflicts of interest are avoided and independent judgment, zealous representation, and protection of confidences are not compromised." Never-

---

[134] ADMIN. & CIV. L. DIV., THE JUDGE ADVOCATE GENERAL'S SCHOOL, U.S. ARMY, JA-263, FAMILY LAW GUIDE (June 1993) (recently uploaded on the Legal Automation Army-Wide System Bulletin Board).

[135] DEP'T OF ARMY, REG. 27-26, LEGAL SERVICES: RULES OF PROFESSIONAL CONDUCT FOR LAWYERS (1 May 1992) [hereinafter AR 27-26].

[136] "A legal assistance attorney may not represent both parties in a negotiation whose interests are fundamentally antagonistic to each other, but common representation is permissible where the clients are generally aligned in interest even though there is some difference of interest among them." *Id.* rule 1.7, cmt. Representation of both spouses seeking to initiate a divorce or negotiate a separation usually involves adverse interests from the outset. In the rare case, representation of harmonious spouses in the preparation of a separation agreement may be possible under Rule 1.7(b) when the spouses provide their informed consent. Common sense, however, supports the preferred practice that different counsel represent each spouse.

[137] *See id.* and accompanying text.

[138] "A Lawyer may be called upon to prepare wills for several family members, such as husband and wife, and depending upon the circumstances, a conflict of interest may arise." AR 27-26, *supra* note 135, rule 1.7, cmt.

[139] *See, e.g.*, United States v. Stubbs, 23 M.J. 188 (C.M.A. 1987) (accused formed attorney-client relationship and discussed facts with a legal assistance attorney who subsequently became a trial counsel; this trial counsel did not discuss accused's case with other trial counsel in office—no disqualification); United States v. Reynolds, 24 M.J. 261 (C.M.A. 1987) (legal assistance officer served as investigating officer of charges originating from claims office—social relationship with other attorneys in office, including trial counsel did not prejudice accused—no disqualification of trial counsel).

theless, *Army Regulation 27-3, The Army Legal Assistance Program,* provides that "Army policy discourages attorneys from the same legal office from providing legal assistance to both spouses involved in a domestic dispute . . . ."[140] *Army Regulation 27-3* provides guidance for supervisory attorneys for authorizing exceptions to this policy when other alternatives for providing legal assistance are not feasible.[141]

Conferring with an Adverse Party

Although Army attorneys may communicate with unrepresented adverse parties, they should exercise caution when doing so. *Army Rule* 4.3 prohibits an attorney from stating or implying that the attorney is disinterested. Moreover, the comment to this rule provides that the attorney should not give advice to an unrepresented person except to obtain counsel.

An attorney should not communicate (or direct or encourage his or her client to communicate) with an adverse party whom the attorney knows to be represented by counsel in the matter, unless the opposing party's counsel has consented to the communication or the communication otherwise is authorized by law.[142]

Relationships with Clients and Former Clients

See ABA Formal Opinion 92-364, "Sexual Relations with Clients,"[143] and Professional Responsibility Opinion 92-6[144] for current guidance.

Tax Notes

Arizona Income Tax Withholding

The Legal Assistance Division of The Judge Advocate General's Corps recently provided the following information for soldiers who are legal residents of Arizona.[145] Beginning 17 July 1993, Arizona law requires the withholding of Arizona State income tax from military pay. The Defense Finance and Accounting Service, Indianapolis Center (DFAS-IN) is scheduled to begin withholding in September 1993.

Currently, a soldier with a gross annual income of less than $15,000 may have Arizona tax withheld at either ten, twenty, twenty-two, twenty-eight, or thirty-two percent of federal withholding. If an election is not made by the soldier, the DFAS-IN will withhold the minimum ten percent. A soldier with a gross annual income of $15,000 or more may have Arizona tax withheld at either twenty, twenty-two, twenty-eight, or thirty-two percent of federal withholding. The DFAS-IN will withhold the minimum twenty percent unless the soldier elects otherwise.

Arizona residents should consider increasing their Arizona withholding to minimize having to pay additional taxes with their 1993 Arizona state income tax return. They should contact their finance office to complete a withholding form. Major Webster.

Casualty Insurance Proceeds—Taxable or Nontaxable?

Are insurance proceeds paid for increased living expenses incurred due to a casualty excludable from the taxpayer's gross income? The Internal Revenue Service (IRS) recently ruled that only the portion of the insurance proceeds exceeding the taxpayer's normal living expenses incurred during the loss period is includable in the taxpayer's gross income for the taxable year in which the loss period ends, or, if later, for the taxable year in which the excess portion of the insurance proceeds is received.[146]

The IRS ruling presented these facts. In July 1989, the taxpayer's principal residence was destroyed by fire. The taxpayer replaced the residence in August 1991. Between July 1989 and August 1991, the taxpayer and members of his household could not use the residence. The taxpayer's insurance contract included coverage for a temporary increase in living expenses resulting from the loss of use or occupancy of the principal residence due to damage or destruction by fire, storm, or other casualty. Accordingly, the taxpayer's insurance company compensated the taxpayer for the temporary increase in living expenses incurred because of the loss of use of the residence.

All legal assistance practitioners and most taxpayers recognize that gross income means all income from whatever source derived, unless excluded by the Internal Revenue Code (IRC).[147] Fortunately, taxpayers benefit from the IRC's limit-

---

[140] DEP'T OF ARMY, REG. 27-3, LEGAL SERVICES: THE ARMY LEGAL ASSISTANCE PROGRAM, para. 4-9c (30 Sept. 1992).

[141] *Id.* para. 4-9.

[142] AR 27-26, *supra* note 135, rule 4.2.

[143] This opinion is reprinted in ARMY LAW., Aug. 1993 at 49.

[144] This opinion is published in ARMY LAW., July 1993 at 49.

[145] Message, Dep't of Army, DAJA-LA (201500A Jul 93). Point of contact for the message is Major Webster, Deputy Chief, Legal Assistance Division, DSN 227-3170, commercial (703) 697-3170. The July, August, and September Net Pay Advices will include a reminder for Arizona residents.

[146] Rev. Rul. 93-43, 1993-24 I.R.B. 54.

[147] I.R.C. § 61 (Maxwell Macmillan 1991).

ed exclusion[148] for amounts received under an insurance contract if paid to compensate or reimburse the taxpayer for living expenses incurred resulting from the loss of use or occupancy of their residence. The excludable amount of the insurance proceeds is limited to the difference between (1) the actual living expenses incurred resulting from the loss of use or occupancy of the residence and (2) the normal living expenses that the taxpayer (and household members) would have incurred during the period that they are unable to use or occupy the principal residence (the loss period).[149]

Revenue Ruling 93-43 contains two illustrations:

> Situation 1. The taxpayer received a total amount of $30,000 in insurance proceeds for increased living expenses: $6000 in 1989, $12,000 in 1990, $10,000 in 1991, and $2000 in 1992. The taxpayer incurred a total of $30,000 in increased living expenses: $5000 in 1989, $11,000 in 1990, and $14,000 in 1991. In this situation, the total amount of the insurance proceeds ($30,000) received does not exceed the total increased living expenses ($30,000) incurred during the loss period (1989 through 1991). Therefore, the entire amount of the insurance proceeds received is excludable.
>
> Situation 2. The taxpayer received a total amount of $25,000 in insurance proceeds for increased living expenses: $20,000 in 1989, $3000 in 1991, and $2000 in 1992. The taxpayer incurred a total of $22,000 in increased living expenses: $5000 in 1989, $10,000 in 1990, and $7000 in 1991. Here, the $20,000 in insurance proceeds received in 1989 plus the $3000 in insurance proceeds received in 1991 exceeds by $1000 the total of $22,000 in increased living expenses incurred during the loss period (1989-1991). Therefore, only $22,000 of the $23,000 in insurance proceeds received from 1989 through 1991 is excludable. The remaining $1000 of these insurance proceeds is includable in the taxpayer's gross income for 1991—the taxable year in which the loss period ended. The $2000 in insurance proceeds received in 1992 further exceeds the increased living expenses incurred during the loss period and, consequently, is includable in the taxpayer's gross income for 1992—the taxable year in which this excess portion was received.

Legal assistance providers may find this information useful when assisting military or retired taxpayers residing in homes destroyed or damaged because of casualties such as fire, storm, or flood. Lieutenant Colonel Hancock.

Deducting Personal Casualty Losses

Section 165 of the IRC authorizes taxpayers to deduct a casualty loss sustained during the taxable year when such loss is not compensated by insurance or otherwise.[150] The loss amount is ordinarily the difference between the property's value before the casualty and its value immediately thereafter.[151]

Casualty losses normally are deducted in the tax year in which the loss actually occurs,[152] although a special rule for

---

[148] *Id.* § 123(a) provides the following:

> In the case of an individual whose principal residence is damaged or destroyed by fire, storm, or other casualty, . . . gross income does not include amounts received by such individual under an insurance contract which are paid to compensate or reimburse such individual for living expenses incurred for himself and members of his household resulting from the loss of use or occupancy of such residence.

[149] I.R.C. § 123(b) (Maxwell Macmillan 1991). Treas. Reg. § 1.123-1(a)(2) (1991) limits this exclusion to amounts received as reimbursement or compensation for the reasonable and necessary increase in living expenses incurred by the insured and members of the household to maintain their customary standard of living during the loss period. Eligible actual living expenses include the costs during the loss period of temporary housing, utilities furnished at the place of temporary housing, meals procured at restaurants which customarily would have been prepared in the residence, transportation, and other miscellaneous services. *Id.*

[150] I.R.C. § 165(a) (Maxwell Macmillan 1991).

[151] *Id.* The loss amount is reduced by any insurance or disaster relief proceeds received to restore the property, further reduced by $100. The allowable deduction is further limited to the amount of all casualty losses for the tax year that exceed 10% of the taxpayers adjusted gross income and is taken on *Internal Revenue Service Form 1040, Schedule A.*

[152] *Id.* § 165(h). Treas. Reg. § 1.165-1(d) (1991) indicates that the loss shall be treated as sustained during the taxable year in which the

> loss occurs as evidenced by closed and completed transactions and as fixed by identifiable events occurring in such taxable year. . . . If a casualty or other event occurs which may result in a loss and, in the year of such casualty or event, there exists a claim for reimbursement with respect to which there is a reasonable prospect of recovery, no portion of the loss with respect to which reimbursement may be received is sustained . . . until it can be ascertained with reasonable certainty whether or not such reimbursement will be received.

some disaster losses exists.[153] Nondisaster casualty losses should be taken in the year the loss occurs even if the taxpayer receives a reimbursement in a subsequent year as illustrated in a recent Tax Court case.

In *Bigoni v. Commissioner*,[154] the taxpayer's uninsured 1985 Porsche 911 was totaled in a wreck in November 1987. Following the accident, a salvage company contracted to pay the taxpayer $1500 salvage value. The salvage payment was made in 1988 and the taxpayer claimed a casualty loss on his 1988 federal income tax return instead of his return for 1987 (the year of the wreck).

The IRS contested the deduction, asserting the taxpayer should have claimed it on the taxpayer's 1987 return. The Tax Court agreed because all events necessary to establish the loss were completed in 1987. Therefore, 1987 was the proper year to claim the casualty loss.

Taxpayers who deduct a casualty loss in one year and receive compensation in a later year do not amend the return for the year they took the loss. Instead, they report the amount received for the loss as income in the year received to the extent of the deductible amount taken in the earlier year.[155]

Legal assistance attorneys receiving inquiries on nonbusiness casualty losses may find it helpful to obtain IRS Publication 547, *Nonbusiness Disasters, Casualties, and Thefts*, for use in assisting taxpayers. Lieutenant Colonel Hancock.

Consumer Law Note

Garnishment of Military Pay—What's Going On?

As originally proposed and passed by the Senate, the Garnishment Equalization Act was intended to apply the remedy of garnishment to all debtors equally, including military personnel.[156] Subsequently, the proposal was incorporated into Senate Bill 185, The Hatch Act Reform Amendments, section 9. Recognizing the Clinton Administration's concern that the approved language did not adequately address the unique position of military personnel, the Senate, on 14 July 1993, approved an amendment that would remove the military from the formal garnishment procedures and, instead, allow the Secretary of Defense to issue regulations authorizing involuntary allotments to satisfy commercial debt.[157]

The regulations "shall" include provisions for the involuntary allotment of pay of a member of the uniformed services for indebtedness owed a third party as determined by the final judgement of a court of competent jurisdiction, and as further determined by competent military or executive authority to be in compliance with the procedural requirements of the Soldiers' and Sailors' Civil Relief Act and consideration for the absence of a member of the uniformed service from an appearance in a judicial proceeding resulting from the exigencies of military duty.[158]

The Hatch Act Reform Amendments passed the Senate on 20 July 1993.[159] The bill should go to conference with the House (House Bill 20, passed in March 1993, contains no garnishment provisions). Appointment of Senate conferees, however, has been postponed.[160] Major Hostetter.

---

[153] I.R.C. § 165(i) (Maxwell Macmillan 1991). Taxpayers may elect to deduct losses occurring in a location the President has declared a disaster area entitled to federal disaster relief on the return for the tax year immediately preceding the tax year in which the disaster occurred. Treas. Reg. § 1.165-11 (1991).

[154] Bigoni v. Commissioner, T.C. Memo 1993-257 (1993) WL 195424.

[155] Treas. Reg. § 1.165-1(d)(2)(iii) (1991).

[156] *See* Consumer Law Update, *The Garnishment Equalization Act is Alive and Well*, ARMY LAW., Apr. 1993, at 22; Consumer Law Note, *Billwatch—House Bill 643 and Senate Bill 316: Garnishment of Federal Pay*, ARMY LAW., June 1992, at 48.

[157] 139 CONG. REC. S8692-01 (daily ed. July 14, 1993) (statements of Sen. Pryor and Sen. Craig).

[158] 139 CONG. REC. S8692-01 (daily ed. July 14, 1993).

[159] BNA Washington Insider, July 21, 1993; 139 CONG. REC. S8950-04 (daily ed. July 20, 1993); 139 CONG. REC. D803-02 (daily ed. July 20, 1993).

[160] 139 CONG. REC. S8954-02 (daily ed. July 20, 1993).

Claims Report

United States Army Claims Service

Personnel Claims Note

Carrier Recovery on Unaccompanied Baggage Shipments

A recent message, 151735Z, SUBJ: Carrier Recovery on Baggage Shipments, informed field claims offices to change their procedures in calculating carrier recovery for these types of moves. This change modified or overruled previous guidance by the Army Claims Service. The text of this message is reprinted below:

1. Pertinent instructions which are affected appear in:

A. Paragraph 11-27a(2), AR 27-20.

B. Paragraph 3-11, DA Pam 27-162.

C. Personnel claims recovery note in the November 1989 issue of *The Army Lawyer* (when carriers base liability on the weight of a bundle).

D. Personnel claims recovery note in the August 1990 issue of *The Army Lawyer* (when carriers fail to list carton size on the inventory).

E. Personnel claims recovery note in the September 1991 issue of *The Army Lawyer* (calculating carrier liability on unaccompanied baggage shipments).

2. The manner in which inventories are prepared is currently the deciding factor when determining carrier liability. What constitutes a "proper" inventory for baggage shipments has become an important issue with the carrier industry and has resulted in voluminous correspondence involving arguments, rebuttals, offsets, and refund requests on this topic. To avoid needless debate and unify the approach of the military services, the Army has entered into the following agreement (printed verbatim) that will be applied to all baggage shipments regardless of whether the carrier is a member of the Household Goods Forwarders' Association of America.

MEMORANDUM OF AGREEMENT

CARRIER LIABILITY FOR LOSS OR DAMAGE ON UNACCOMPANIED BAGGAGE SHIPMENTS

This memorandum of agreement is entered into by the United States Army Claims Service and the Household Goods Forwarders Associations of America, Inc., to provide standards to determine the weight to be used in computing carrier liability on unaccompanied baggage shipments. The effective date of this memorandum of agreement is August 1, 1993. The standards set forth below will apply to Army liability calculations for unaccompanied baggage shipments where the demand is dispatched on or after the effective date of this MOA.

1. For item(s) packed in internal cartons whose size is properly noted on the inventory, the weight of that item will be determined by referring to the Joint Military/Industry Table of Weights and Depreciation Guide (hereinafter "Table of Weights").

2. For item(s) packed into internal cartons whose size is not properly noted on the inventory, the weight of that item will be determined by referring to the notes in the table of weights. These notes provide that unidentified cartons will have weight assigned according to contents, but that in no event shall a weight of less than 25 pounds be assigned.

3. For item(s) not packed in internal cartons, but which have an assigned weight in the table of weights, the weight of that item will be determined by referring to the table of weights, including the notes for items whose dimensions are not properly specified.

4. For item(s) which are required to be packed in internal cartons under the tender of service or other appropriate MTMC guidance, but which are not listed on the inventory as being packed in a carton, the weight will be determined by applying the most likely carton size that would contain these items (e.g., dishes in a dishpack).

5. For single item(s) not required to be packed in internal cartons and not listed separately in the table of weights, or for bundles of items like brooms, rakes, tools, fishing poles, etc., the weight of the item(s) will be determined by using the stated or appropriate bundle size weight listed in the table of weights.

6. Army Claims Offices will make every attempt to use the inventory to establish appropriate weights using the standards set forth above. Liability will not be assessed on the basis of gross weight of the shipping container unless it cannot be determined under the standards set forth above and the inventory significantly fails to identify how the items were packed (e.g., all items are listed horizontally as having been packed in a shipping container with no further subdivision of individually packed items or internal cartons).

SUPPLEMENTAL AGREEMENT

It is further agreed that those standards for calculating liability for unaccompanied baggage shipments will be applied to claims presently pending at the U.S. Army Claims Service (USARCS) which have not been settled or offset, and to refund requests received by USARCS prior to March 1, 1993. Dated this 13th day of July 1993.

3. Refer questions concerning baggage liability to the Recovery Branch, USARCS, at (301) 677-7789 or DSN 923-7789. Colonel Bush.

Labor and Employment Law Notes

OTJAG, Labor and Employment Law Office

Equal Employment Opportunity Note

Supreme Court Clarifies Burden of Proof Under Title VII

Every labor counselor and equal employment opportunity officer is familiar with the "shifting burdens" set forth in *McDonnell Douglas*[1] and *Burdine*,[2] both benchmark Supreme Court cases. What often creates confusion and problems in the early administrative processing of an Equal Employment Opportunity (EEO) complaint is what the term "burden" refers to. Both *McDonnell Douglas* and *Burdine* establish a shifting "burden of persuasion"—the complainant must establish a prima facie case, and if successful, the burden of production shifts to management to articulate legitimate nondiscriminatory reasons for its actions. The complainant then must show that the articulated reasons are a pretext for discrimination. The burden of persuasion always remains with the complainant. Over time, however, some factfinders have come to view the burden of production as almost synonymous with "burden of proof." But the rule of *McDonnell Douglas* and *Burdine* always has been that, although the burden of production shifts, the burden of proof that discrimination occurred always remains with the complainant. The Supreme Court recently re-emphasized this point in *St. Mary's Honor Center v. Hicks*,[3] a five-to-four decision. The majority stated that, to prevail on a discrimination complaint, the complainant must do more than show that the articulated management rationale is a pretext. The Court held that to be successful, a complainant must carry the burden of proof that management acted with discriminatory intent.

In *Hicks*, the District Court found that the employee established, by a preponderance of the evidence, a prima facie case of discrimination; that management had rebutted that presumption with evidence of two legitimate nondiscriminatory reasons; and that management's articulated reasons were pretextual.[4] Nevertheless, the District Court found that the employee was not subjected to discrimination because he failed to prove that the adverse employment actions were racially motivated.

The Court of Appeals overturned the decision, holding that the employee was entitled to judgment as a matter of law once he proved that all of the management's articulated reasons were pretextual.[5]

The Supreme Court held that the Court of Appeals improperly allocated the burden of proof. Specifically, the Court noted that the burden of persuasion remains at all times with the party alleging discrimination. The majority opinion set forth the proposition that under *McDonnell Douglas*, the prima facie case acts only as a rebuttable presumption[6] and that once management counters this presumption with the articulation of a legitimate nondiscriminatory reason, the presumption is forever rebutted. The analysis then shifts to whether or not the employee proves unlawful discrimination. In this regard, the Court noted that the analysis requires a finding that the proffered reason is a "pretext for discrimination" and that such a showing has two elements: (1) the reason was false; and (2) discrimination was the real reason.

From a practical standpoint, labor counselors should argue the new analysis set forth in *Hicks*, but not rely on it to be outcome determinative. The majority's opinion acknowledged that an employee *may* prove discrimination by establishing the falsity of the management reason:

> The factfinder's disbelief of the reasons put forward by the defendant (particularly if disbelief is accompanied by a suspicion of mendacity) may, together with the elements of the prima facie case, suffice to show intentional discrimination. Thus, rejection of the defendant's proffered reasons, will permit the trier of fact to infer the ultimate fact of intentional discrimination . . . .

In other words, after *Hicks*, third party adjudicators may find discrimination when the articulated legitimate nondiscriminatory reasons are found to be pretextual *only if* the trier of fact makes an additional finding that the complainant has met not only the burden of persuasion, but the burden of proof. This may require additional evidence, or it may not, depending on the facts of the case. What *Hicks* says, however, is that a showing of pretext, as a matter of law, is insufficient for a complaint to prevail on the merits; the complainant must prove discriminatory intent. Mr. Meisel.

---

[1] McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973).

[2] Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248 (1981).

[3] 113 S. Ct. 2742 (1993).

[4] United States v. Hicks, 756 F. Supp. 1244 (E.D. Mo. 1991).

[5] United States v. Hicks, 970 F.2d 487 (8th Cir. 1992).

[6] *See* FED. R. EVID. 301.

Civilian Personnel Law Notes

The MSPB Upholds Discipline of Supervisor for Violating Army Policy on Sexual Harassment

In *Alsedek v. Department of the Army*,[7] the Merit Systems Protection Board (MSPB or Board) sustained a disciplinary action against a supervisor for sexual harassment in violation of Army policy. The appellant was demoted, suspended for thirty days and barred for two years from consideration for a supervisory position based upon three charges: sexual harassment in violation of agency policy; attempting to influence or alter the testimony of witnesses in an investigation; and failure to meet the performance standard for the EEO critical element of his performance plan. The Administrative Judge (AJ) sustained the action.

The appellant petitioned for review, arguing that the AJ erred in concluding that he created a hostile environment because he lacked sexual intent, the harassment was not pervasive, and the victims were not injured. The Board, in rejecting the appellant's claim, distinguished between the standards of proof required when an employee is charged with sexual harassment in violation of Title VII and sexual harassment in violation of agency policy. If the agency charges an employee with sexual harassment in violation of Title VII, 29 *Code of Federal Regulations*, section 1604.11(a) or an agency policy essentially identical to the Equal Employment Opportunity Commission definition of sexual harassment, the agency must prove that the unwelcome sexual conduct occurred and that the conduct involved quid pro quo harassment or created a hostile work environment.[8] In contrast, to support a charge of violating an agency policy against sexual harassment, the agency need only prove that the employee violated the policy. The Board noted that the Army policy against sexual harassment prohibited "deliberate or repeated offensive comments, gestures, or physical contact of a sexual nature in a work or work-related environment." The Board concluded that the agency was not required to establish that the appellant created a hostile work environment. The Board noted that the discussion of a hostile environment in the proposal letter was not part of the charge and served only to emphasize the disruptive nature of appellant's conduct on the workplace in the context of nexus and penalty. The Board also concluded that the penalty—including the two year exclusion from consideration for supervisory positions—was reasonable. Although the exclusion by itself is not appealable to the Board, the Board concluded that it had jurisdiction to review the exclusion because it was part of a "unitary penalty" in an appealable adverse action. Ms. Nugent.

Unconscionable Provision in Last Chance Agreement Does Not Invalidate Entire Agreement

When negotiating a Last Chance Settlement Agreement (LCA), in addition to the typical promise to maintain satisfactory performance and conduct, and waive appellate review rights, the agency included a clause that the employee "waives all rights and claim to attorney fees and appeals costs, and agrees to pay the Agency's cost of any appeal filed as a result of breaking this agreement."[9]

In *Butler v. Department of Navy*,[10] the agency removed the employee for breach of the last chance agreement by being absent without leave and failing to follow his supervisor's instructions. On appeal to the MSPB, the AJ found that the employee had breached the LCA as alleged. The AJ also found, however, that the provision requiring the employee to pay the agency's appeal costs was an unconscionable attempt to discourage the employee from contesting whether a breach had occurred, which was a right not waived. Consequently, the AJ invalidated the entire LCA and overturned the agency's removal of the employee for breach of the LCA.

In a case of first impression, the Board held that the inclusion of a single term that is contrary to public policy does not obviate the entire LCA. The Board did note, however, that "[i]f an agency were to insist on including in its last-chance agreements provisions that the Board has previously found to be unconscionable or contrary to public policy, such action might evidence bad faith or 'serious misconduct' sufficient to invalidate a last-chance agreement in its entirety." The Board found that such an outcome was not warranted, the LCA was valid and enforceable without the offending provision, and dismissed the appeal for lack of jurisdiction. Mr. Meisel.

No Exclusionary Rule in MSPB Cases

In *Delk v. Department of the Interior*,[11] the United States Park Police obtained a properly authorized search warrant alleging possession of specified stolen government property.[12] In its execution, however, the police exceeded the

---

[7] No. PH075229048811 (M.S.P.B. July 2, 1993).

[8] *See also* Carosella v. United States Postal Service, 816 F.2d 638 (Fed. Cir. 1987).

[9] No. AT07529110390 (M.S.P.B. 1993).

[10] *Id.*

[11] No. DC0752920526-I-1 (M.S.P.B. June 3, 1993).

[12] The stolen property in question was a "National Park Service picnic table and a new poured concrete patio." McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973).

scope of the warrant and seized other government property. The agency removed the employee for conversion of government property for personal use and violation of the agency's employee responsibilities and conduct regulations. In his appeal, the employee argued that because the police had exceeded the scope of the warrant, the evidence should be excluded.

The MSPB upheld the agency. The Board held that the "fruit of the poisonous tree" doctrine—applicable to criminal search and seizure law—does not carry over to administrative proceedings. The Board noted that such a rule would have little, if any, deterrence on police misconduct. Furthermore, society's interest in the integrity of public servants outweighs any interest advanced by such an exclusion. Mr. Meisel.

Practice Pointer

Army Regulation 40-5[13] and *Johnson Controls*[14]

In *Johnson Controls,* the United States Supreme Court held that Title VII, as amended by the Pregnancy Discrimination Act of 1978,[15] forbids sex-specific fetal-protection policies.[16] Johnson Controls manufactures batteries, a major component of which is lead. Because lead is hazardous to a fetus, the company excluded pregnant women and women capable of becoming pregnant from jobs that would expose them to lead. This policy effectively limited women at the company to lower paying jobs.

The Court noted that, although the company appeared to be acting sincerely in protecting women's unconceived and conceived children, this policy still amounted to sex-based discrimination.[17] Men capable of fathering children were not excluded from these same positions despite evidence concerning the effect of lead exposure on their reproductive system.[18] The Court rejected the business necessity, bona fide occupational qualification, and safety exception defenses stating that "permissible distinctions based on sex must relate to ability to perform the duties of the job."[19] Johnson Controls could not provide such evidence. Concerning potential tort liability, the Court stated that if "Title VII bans sex-specific fetal-protection policies, the employer fully informs the woman of the risk, and the employer has not acted negligently, the basis for holding an employer liable seems remote at least."[20] The woman, not the employer, must make the final decision on whether to work in potentially hazardous situations.[21]

Army Regulation 40-5 Medical Services: Preventive Medicine (*AR 40-5*) addresses potential work area reproductive hazards. Paragraph 5-20 provides for a reproductive hazards program to assure that male and female employees are informed of potential work area reproductive hazards and that pregnant employees are not endangered by their work assignments. This program includes counseling all employees about any potential occupational hazards to reproduction, notifying the occupational health clinic of pregnancies, assessing the employees' job assignments and work environments when pregnancies are known, recommending specific job limitations after consulting with the employees' physicians, and informing women about the availability of job accommodation or transfer in the event of pregnancy.

Because *AR 40-5* went into effect prior to *Johnson Controls*, the two must be read together when dealing with employees who work in areas potentially hazardous to their reproductive systems. *Army Regulation 40-5* meets the requirement of protecting and fully informing employees of the risks in their jobs. *Johnson Controls* adds the final requirement of informing pregnant women that they have the choice whether to stay or terminate their employment.

Labor counselors should inform supervisors, occupational health clinic personnel, and the rest of the labor-management team on the proper practices and procedures to follow in these situations. Taking such actions should eliminate future complaints like one recently addressed by the Department of the Army. This case involved a temporary wage grade support worker assigned to a special camouflage painting project for Army vehicles supporting Operation Desert Storm. The employee learned that she was pregnant on February 5, 1991, and she notified her immediate supervisor of her pregnancy the next day. Her employment was terminated five days later after it was determined that, because she was pregnant, she

---

[13] DEP'T OF ARMY, REG. 40-5, MEDICAL SERVICES: PREVENTIVE MEDICINE (15 Oct. 1990) [hereinafter AR 40-5].

[14] International Union, United Auto., Aerospace and Agric. Implement Workers of America, UAW, et. al., v. Johnson Controls, Inc., 111 S. Ct. 1196 (1991).

[15] 42 U.S.C. § 2000e(k) (1988).

[16] *Johnson Controls, supra* note 14, at 1198, 1202-10.

[17] *Id.* at 1203.

[18] *Id.*

[19] *Id.* at 1206.

[20] *Id.* at 1208.

[21] *Id.* at 1210.

could not continue to work around fumes and dust. No other positions were available. The employee immediately filed a complaint alleging that she was the victim of sex discrimination when her employment was terminated. Based on the specific facts in the case, the Army agreed.[22] Ms. Harvey.

Share This Information with the Rest of the Team

Be sure to pass these Labor and Employment Law Notes to the rest of the labor-management team.

[22]The Army actions leading to the employee's termination took place prior to *Johnson Controls.* The Army decision, however, noted that the Army's conduct still must conform to that ruling because "it only interprets the very clear ban on discrimination because of pregnancy which Congress passed in 1978."

Professional Responsibility Notes

OTJAG, Standards of Conduct Office

Ethical Awareness

The following case summaries describe the application of the Army's *Rules of Professional Conduct for Lawyers (Army Rules)*[1] to actual professional responsibility cases. These items serve not only as precedent, but also as training vehicles for Army lawyers as they ponder difficult issues of professional discretion.

To stress education and protect privacy, neither the identity of the office nor the name of the subject will be published. Mr. Eveland.

Case Summaries

Army Rule 3.4
(Fairness to Opposing Party and Counsel)

An Army trial counsel who showed documents to two witnesses and then told them to resolve their differing versions of events, although making careless remarks subject to misinterpretation, did not commit an ethical violation.

Private *C* was the third military policeman (MP) to be tried in a related series of larceny cases. His defense counsel moved to dismiss the charges, alleging that Captain *G*, the trial counsel, committed prosecutorial misconduct and violated *Army Rule* 3.4[2] when he told two government witnesses to discuss and resolve inconsistencies in their testimony. These witnesses were the first two MPs to be convicted, Specialists *A* and *B*.

Captain *G*'s written response to the motion said he only wanted to make the testimony correct and free from fabrication, and did not "attempt to have the witness's corroborate [sic] their testimony." When Private *C*'s motion was litigated, it was clear that Captain *G* did show duty rosters to both *A* and *B,* and the dates and entries did conflict with their earlier testimony.

Specialist *A* testified that after he was in Captain *G*'s office he found out that his story was incorrect; it was like learning new information. Specialist *B* steadfastly denied that Captain *G* ever had told the two of them to get together and get their stories straight. Sergeant *E*, the witnesses' former squad leader who escorted them to see Captain *G,* testified that Captain *G* told *A* and *B* about the importance for them to go over the dates and get their stories straight because the Article 32 hearing was the next day and their testimony had to be believable. Sergeant *E* told how *A* previously had said that he was going to make up stories about the related cases. All witnesses agreed that Captain *G* told *A* and *B* to be honest.

[1] DEP'T OF ARMY, REG. 27-26, LEGAL SERVICES: RULES OF PROFESSIONAL CONDUCT FOR LAWYERS (1 May 1992) [hereinafter AR 27-26].

[2] *Id.* rule 3.4. Rule 3.4 (Fairness to Opposing Party and Counsel) provides the following:

> A lawyer shall not: (a) unlawfully obstruct another party's access to evidence or unlawfully alter, destroy, or conceal a document or other material having potential evidentiary value. A lawyer shall not counsel or assist another person to do any such act; [or] (b) falsify evidence, counsel or assist a witness to testify falsely . . . .

Rule 3.4's commentary states "[t]he procedure of the adversary system contemplates that the evidence in a case is to be marshalled competitively by the contending parties. Fair competition in the adversary system is secured by prohibitions against destruction or concealment of evidence, improperly influencing witnesses, obstructive tactics in discovery procedure, and the like."

The military judge concluded that Captain *G* had not been trying to corrupt the proceedings or suborn perjury; he only was trying to dig into and refresh the witnesses' memory by telling them to get together and review the duty rosters. The military judge ruled that even though the potential for misinterpretation of Captain *G*'s remarks to the witnesses existed, it did not occur.

Private *C* was acquitted when his case went to trial. Thereafter, the deputy staff judge advocate counseled Captain *G* that when faced with inconsistent prosecution witnesses, appearances are vital because anything the least bit questionable will be misconstrued.

A preliminary screening official (PSO) was appointed. He examined the allegation of ethical impropriety and agreed with the military judge's findings. The PSO recommended no further action and gave his report to Captain *G*'s supervisory judge advocate, who also agreed that no misconduct had occurred. The file was forwarded to the Standards of Conduct Office, which closed the case, agreeing with the PSO and supervisory judge advocate.

Army Rule 1.1
(Competence)

An Army legal assistance attorney provided incompetent representation when he misadvised clients about the effect of a VA foreclosure notice.

Sergeant and Mrs. *R* owned a house in the United States, purchased with Department of Veteran's Affairs (VA) financing. They decided to sell the house because of an overseas assignment. After talking with their real estate sales agent and the title company's attorney, the *R*s believed that the buyer was substituting his own VA entitlement, that would release them from liability on the loan.

A year later, after the couple received a foreclosure notice, they visited Captain *X*, an Army legal assistance attorney. According to the *R*s, Captain *X* reviewed the notice, and, although they took all of their records and documents regarding the property to the appointment, Captain *X* did not request to see any documentation other than the notice. The husband and wife disagreed as to whether or not they actually told Captain *X* that other documents were available for review. The *R*s told Captain *X* that the sale had been conducted in such a manner that they no longer had any liability for the loan. The *R*s said that after Captain *X* had examined the notice, he told them not to worry because it merely was a courtesy notification to repurchase the house if they wanted. Thereafter, in reliance on Captain *X*'s advice, they ignored all other correspondence until the VA sent an $11,457 demand.

The *R*s then met with Captain *Z*, a second legal assistance attorney, who wrote letters on their behalf. Both the real estate sales agent and the title company attorney denied even suggesting that the sellers would be relieved from liability for the VA loan.

After the couple filed an administrative claim based on legal malpractice, a PSO was appointed. The PSO found Captain *X*'s attitude to be relevant. Captain *X* thought of himself as quite adequate in virtually all matters—to the extent of being a know-it-all—and he was less likely than others to admit that he did not know something or to discuss matters with other lawyers. Because of this attitude, Captain *X*'s relationships with his supervisor and fellow attorneys were reserved and he seldom sought their opinions. The PSO also found that the legal assistance office faced an exceptionally heavy workload.

Captain *X* could remember talking with the couple only about wills and a credit card problem, but not any VA real estate documents. When Captain *X* was shown the VA foreclosure notice, he stated that he did not believe he had ever seen it. Captain *X* said that his practice was to review related documents when rendering an opinion, and, that if he had seen the foreclosure notice, he would have asked for further documentation.

The PSO interviewed a battalion adjutant whose soldiers were serviced by Captain *X*'s office. The adjutant said that in three years he had never heard a complaint against Captain *X*. The adjutant further stated that he found Captain *X*'s work to be entirely satisfactory and meticulous. The adjutant—who knew Sergeant and Mrs. *R* personally—said that neither one would do anything dishonest. Although Sergeant *R* apparently had a limited capacity for understanding complex matters, his wife was mentally sharp with the ability to understand the proceedings.

The PSO found Sergeant and Mrs. *R*, as well as Captain *X*, to be credible. The PSO did not perceive any of the parties as saying things they did not believe to be true. The PSO concluded that the *R*s probably did visit Captain *X* about the foreclosure notice. The PSO reasoned that, based on Captain *X*'s advice, the *R*'s ignored the follow-up letters because people protecting their own interests would not have ignored them otherwise. The PSO found that Mrs. *R* certainly had the capacity to understand a legal explanation, and whatever Captain *X* said did not alert her to the inherent dangers of the pending foreclosure.

The PSO distilled two possible interpretations: (1) the *R*s fabricated the story about the advice they received, or (2) Captain *X* encountered that terrible moment that even the best lawyers fear—when tired and overworked, an attorney gives advice without sufficient thought. The PSO concluded that the latter scenario occurred. The supervisory judge advocate agreed with the PSO. After Captain *X*'s staff judge advocate counseled him, the supervisory judge advocate closed the inquiry into his professional conduct and recommended that no further action be taken because Captain *X* had been, and still was, an excellent lawyer and officer. The Executive, Office of The Judge Advocate General, agreed and authorized the supervisory judge advocate to close the case.[3]

[3] The claim, which was within the geographical area jurisdiction of another service, was compromised and settled with Mrs. *R*.

Guard and Reserve Affairs Items

Guard and Reserve Affairs Division, OTJAG

Reserve Component Quotas for Resident Graduate Course

Two student quotas in the 43rd Judge Advocate Officer Graduate Course have been set aside for Reserve Component Judge Advocate General's Corps (JAGC) officers. The forty-two week graduate level course will be taught at The Judge Advocate General's School in Charlottesville, Virginia from 1 August 1994 to 12 May 1995. Successful graduates will be awarded the degree of Master of Laws (LL.M.) in Military Law. Any Reserve Component JAGC captain or major who will have at least four years JAGC experience by 1 August 1994 is eligible to apply for a quota. An officer who has completed the Judge Advocate Officer Advanced Course, however, may not apply to attend the resident course. Each application packet must include the following materials:

Personal data: Full name (including preferred name if other than first name), grade, date of rank, age, address, and telephone number (business, fax, and home).

Military experience: Chronological list of reserve and active duty assignments; include *all* OERs and AERs.

Awards and decorations: List of all awards and decorations.

Military and civilian education: Schools attended, degrees obtained, dates of completion, and any honors awarded. Law school transcript.

Civilian experience: Resume of legal experience.

Statement of purpose: A concise statement (one or two paragraphs) of why you want to attend the resident graduate course.

Letter of Recommendation: Include a letter of recommendation from one of the judge advocate leaders listed at the top of the next column:

USAR TPU: Military Law Center Commander or Staff Judge Advocate.

ARNG: Staff Judge Advocate.

USAR IMA: Staff Judge Advocate of proponent office.

DA Form 1058 (USAR) or NGB Form 64 (ARNG): The *DA Form 1058* or *NGB Form 64* must be filled out and be included in the application packet.

Routing of application packets: Each packet shall be forwarded through appropriate channels. All applications must be received no later than 31 December 1993.

ARNG: Through the state chain of command to Office of The Judge Advocate, ATTN: NGB-JA, 2500 Army, Pentagon, Washington, DC 20310-2500.

USAR CONUS TROOP PROGRAM UNIT (TPU): Through MUSARC chain of command, to Commander, ARPERCEN, ATTN: DARP-ZJA, St. Louis, MO 63132-5200.

USAR CONTROL GROUP (IMA/REINFORCEMENT): Commander, ARPERCEN, ATTN: DARP-ZJA, St. Louis, MO 63132-5200.

The Judge Advocate General's Continuing Legal Education (On-Site) Schedule Update

The following is an updated schedule of The Judge Advocate General's continuing legal education On-Sites. If you have any questions concerning the On-Site schedule, direct them to the local action officer or CPT David L. Parker, Chief, Unit Liaison and Training Office, Guard and Reserve Affairs Division, Office of The Judge Advocate General, telephone (804) 972-6380.

The Judge Advocate General's
School Continuing Legal Education (On-Site) Training, Academic Year 1994

DATE	CITY, HOST UNIT AND TRAINING SITE	AC GO/RC GO SUBJECT/INSTRUCTOR/GRA REP		ACTION OFFICER
16-17 Oct 93	Minneapolis, MN 214th LSO Thunderbird Motor Hotel 2201 East 78th St. Bloomington, MN 55425	AC GO RC GO Contract Law Ad & Civ Law GRA Rep	 COL Cullen MAJ Melvin MAJ Hernicz LTC Hamilton	MAJ William D. Turkula 7290 Topview Road Eden Prairie, MN 55346 (612) 672-3600
23-24 Oct 93	Willow Grove, PA 79th ARCOM/153d LSO Willow Grove Naval Air Station Air Force Auditorium Willow Grove, PA 19090	AC GO RC GO Int'l Law Contract Law GRA Rep	 COL Lassart MAJ Winters MAJ Hughes LTC Menk	LTC Robert C. Gerhard 619 Curtis Rd. Glenside, PA 19038 (215) 885-6780
13-14 Nov 93	New York City, NY 77th ARCOM/4th LSO Fordham Law School New York, NY 10023	AC GO RC GO Ad & Civ Law Contract Law GRA Rep	 Cullen/Lassart/Sagsveen MAJ Block MAJ Tomanelli COL Schempf	LTC John Greene 437 73d Street Brooklyn, NY 11209 (212) 264-0650
20-21 Nov 93	Boston, MA 94th ARCOM/3d LSO Hanscom Air Force Base Bedford, MA 01731	AC GO RC GO Criminal Law Ad & Civ Law GRA Rep	 COL Lassart MAJ Masterson MAJ Drummond LTC Hamilton	MAJ Donald Lynde 94th ARCOM Bldg. 1607 Hanscom AF Base, MA 01731 (617) 377-2845
8-9 Jan 94	Long Beach, CA 78th LSO Long Beach Marriott Inn Long Beach, CA 90815	AC GO RC GO Ad & Civ Law Criminal Law GRA Rep	 COL Sagsveen LTC McFetridge MAJ Burrell Dr. Foley	MAJ John C. Tobin 10541 Calle Lee Suite 101 Los Alamitos, CA 90720 (714) 752-1455
21-23 Jan 94	San Antonio, TX 90th ARCOM TBD	AC GO RC GO Ad & Civ Law Contract Law GRA Rep	 COL Cullen MAJ Emswiler LTC Dorsey COL Schempf	CPT William Hintze HQ, 90th ARCOM 1920 Harry Wurzbach Hwy. San Antonio, TX 78209 (210) 221-5164
29-30 Jan 94	Seattle, WA 6th LSO Univ. of Washington Law School Seattle, WA 78205	AC GO RC GO Criminal Law Int'l. Law GRA Rep	 COL Cullen MAJ O'Hare LCDR Winthrop LTC Hamilton	MAJ Mark W. Reardon 6th LSO Bldg. 572 Fort Lawton, WA 98199 (206) 281-3002
26-27 Feb 94	Salt Lake City, UT 87th LSO Olympus Hotel 6000 Third St., West Salt Lake City, UT 84114	AC GO RC GO Criminal Law Contract Law GRA Rep	 COL Sagsveen MAJ Wilkins MAJ Killham CPT Parker	MAJ Roger Corman 87th LSO, Bldg. 100 Douglas AFRC Salt Lake City, UT 84113 (801) 833-2119

The Judge Advocate General's
School Continuing Legal Education (On-Site) Training, Academic Year 1994

DATE	CITY, HOST UNIT AND TRAINING SITE	AC GO/RC GO SUBJECT/INSTRUCTOR/GRA REP		ACTION OFFICER
26-27 Feb 94	Denver, CO 87th LSO Edgar L. McWethy, Jr. USARC Bldg. 820 Fitzsimons Army Medical Ctr Aurora, CO 80045-7050	AC GO RC GO Criminal Law Contract Law GRA Rep	 COL Cullen MAJ Wilkins MAJ Killham Dr. Foley	LTC Dennis J. Wing Bldg. 820 McWethy USARC Fitzsimons AMC Aurora, CO 80045-7050 (303) 343-6774
5-6 Mar 94	Columbia, SC 120th ARCOM University of South Carolina Law School Columbia, SC 29208	AC GO RC GO Int'l Law Ad & Civ Law GRA Rep	 COL Sagsveen MAJ Hudson MAJ Jennings LTC Menk	MAJ Robert H. Uehling 209 South Springs Road Columbia, SC 29223 (803) 733-2878
12-13 Mar 94	Washington, D.C. 10th LSO NWC (Arnold Auditorium) Fort Lesley J. McNair Washington, D.C. 20319	AC GO RC GO Criminal Law Ad & Civ Law GRA Rep	 COL Lassart MAJ Winn MAJ Diner CPT Parker	CPT Robert J. Moore 10011 Indian Queen Pt. Rd. Fort Washington, MD 20744 (202) 835-7610
19-20 Mar 94	San Francisco, CA 5th LSO Sixth Army Conference Room Bldg. 35 Presidio of SF, CA 94129	AC GO RC GO Criminal Law Int'l Law GRA Rep	 Cullen/Lassart/Sagsveen MAJ Jacobson MAJ Warren COL Schempf	MAJ Robert Jesinger 20683 Greenleaf Drive Cupertino, CA 95014-8808 (408) 297-9172
9-10 Apr 94	Fort Wayne, IN Marriott Hotel 305 E. Washington Center Road Fort Wayne, IN 46825 (219) 484-0411	AC GO RC GO Contract Law Int'l Law GRA Rep	 COL Sagsveen MAJ DeMoss MAJ Warren LTC Menk	MAJ Byron N. Miller 200 Tyne Road Louisville, KY 40207 (502) 587-3400
23-24 Apr 94	Atlanta, GA 81st ARCOM TBD	AC GO RC GO Criminal Law Int'l Law GRA Rep	 COL Lassart MAJ Hayden LTC Crane COL Schempf	MAJ Carey Herrin 81st ARCOM 1514 E. Cleveland Avenue East Point, GA 30344 (404) 559-5484
7-8 May 94	Gulf Shores, AL 121st ARCOM/ALARNG Gulf State Park Resort Hotel Gulf Shores, AL 36547	AC GO RC GO Ad & Civ Law Int'l Law GRA Rep	 COL Sagsveen MAJ Peterson MAJ Warner LTC Menk	LTC Samual A. Rumore 5025 Tenth Court, South Brimingham, AL 35203 (205) 323-8957
13-15 May 94	New Orleans, LA 122nd ARCOM TBD	AC GO RC GO Int'l Law Criminal Law GRA Rep	 COL Lassart MAJ Johnson MAJ Hunter Dr. Foley	LTC George Simno Leroy Johnson Drive New Orleans, LA 70146 (504) 484-7655
21-22 May 94	Columbus, OH 83d ARCOM/9th LSO/ OH STARC TBD	AC GO RC GO Contract Law Int'l Law GRA Rep	 COL Cullen MAJ Causey LTC Crane CPT Parker	LTC Thomas G. Shumacher 762 Woodview Drive Edgewood, KY 41017-9637 (513) 684-3583

Notes from the Field

Unlawful Command Influence: Raising and Litigating the Issue

Unlawful Command Influence

Practitioners of military justice should be familiar with the oft-quoted statement of the United States Court of Military Appeals (COMA) in *United States v. Thomas*: "Command influence is the mortal enemy of military justice."[1]

Article 37, of the Uniform Code of Military Justice (UCMJ),[2] prohibits the exercise of unlawful command influence. That prohibition is established further in Rule for Courts-Martial (R.C.M.) 104.[3] The rule provides in relevant part:

> No person subject to the code may attempt to coerce or, by any unauthorized means, influence the action of a court-martial or any other military tribunal or any member thereof, in reaching the findings or sentence in any case or the action of any convening, approving, or reviewing authority with respect to such authority's judicial acts.[4]

The fundamental principle that underlies the UCMJ prohibition is the desire to free the military justice system from the operation of the subtle—and sometimes blatant—pressures that can be exerted in the military along command channels.[5] Because the issue can prove elusive at the trial level, command influence is not waived if not raised at trial,[6] and cannot be waived in a pretrial agreement.[7] Actual unlawful command influence exists when the "convening authority has been brought into the deliberation room," and apparent unlawful command influence exists when "a reasonable member of the public, if aware of all the facts, would have a loss of confidence in the military justice system and believe it to be unfair."[8]

Both actual and perceived fairness are at the heart of the unlawful command influence issue. The COMA recognizes this fairness, "One of the most sacred duties of a commander is to administer fairly the military justice system for those under his command."[9]

Judicial Authorities and Their Legal Advisors

Each commander in an accused's chain of command has independent discretion to determine how charges will be disposed, except to the extent that a commander's authority has been withheld by superior competent authority.[10] Although subordinate commanders may consider the guidance of superiors, they must understand and believe that their independent discretion is unfettered, and that they are free to accept or reject the views of their superiors.[11]

Convening authorities, too, must exercise their powers free from "unseen strings or superiors influencing [their] actions."[12] The decision to refer charges to a court-martial, the level of disposition, and any other decisions concomitant with that authority, are functions in the office of the convening authority and are matters entirely in the convening authority's discretion.[13] Moreover, the law recognizes a strong

---

[1] 22 M.J. 388, 393 (C.M.A. 1986).

[2] 10 U.S.C.A. § 837 (West 1993).

[3] MANUAL FOR COURTS-MARTIAL, United States, R.C.M. 104 (1984) [hereinafter MCM].

[4] *Id.*

[5] United States v. Kitts, 23 M.J. 105, 108 (C.M.A. 1986).

[6] United States v. Blaylock, 15 M.J. 190 (C.M.A. 1983).

[7] *Kitts*, 23 M.J. at 108.

[8] United States v. Allen, 31 M.J. 572, 590 (N.M.C.M.R. 1990) *aff'd*, 33 M.J. 209 (C.M.A. 1991).

[9] United States v. Thomas, 22 M.J. 388, 400 (C.M.A. 1986).

[10] MCM, *supra* note 3, R.C.M. 401(a) discussion.

[11] United States v. Rivera, 45 C.M.R. 582 (C.M.A. 1972).

[12] United States v. Hagen, 25 M.J. 78 (C.M.A. 1987).

[13] United States v. Allen, 31 M.J. 572, 591 (N.M.C.M.R. 1990).

presumption of correctness and regularity in the military justice system and the exercise of prosecutorial discretion by a convening authority.[14] Nevertheless, the "very perception that a person exercising this awesome power is dispensing justice in an unequal manner or is being influenced by unseen superiors is wrong."[15]

In exercising his or her power, the convening authority may seek advice from the assigned legal advisor. Indeed, the convening authority, as an authorized official of the Army, is considered the legal advisor's client.[16] In representing his or her client, a legal advisor shall exercise independent professional judgment and render candid advice.[17] Moreover, in rendering advice, a legal advisor may refer not only to law but to other considerations such as relevant moral, economic, and social factors.[18] The official comment to Rule 2.1 of the Army's *Rules of Professional Conduct for Lawyers* offers further guidance and states:

> A client is entitled to straightforward advice expressing the lawyer's honest assessment. . . . It is proper for a lawyer to refer to relevant moral and ethical considerations in giving advice. Although a lawyer is not a moral advisor as such, moral and ethical considerations impinge upon most legal questions and may decisively influence how the law will be applied. . . . [A] lawyer's responsibility as advisor may include indicating that more may be involved than strictly legal considerations.[19]

Considerations such as the fair and efficient administration of military justice in a convening authority's jurisdiction, are well within the range of acceptable advice from his or her legal advisor. Outside acceptable parameters for legal "advice," however, are policy suggestions from the convening authority's superiors.[20] Further, a staff judge advocate acts "with the mantle of command authority."[21] Therefore, trial counsel and chiefs of military justice also act with the trappings of command authority. Consequently, legal advisors must realize that command influence can be exerted through "legal" channels and must consider carefully the content of advice to commanders who exercise UCMJ authority. Indications of what "the boss" wants or will do when advising subordinate commanders must be avoided.

Raising the Issue—the Government

Obviously, when actual or apparent unlawful command influence is detected during the initial stages of a criminal investigation, or after preferral of charges but before referral of the case, the issue should be raised to the convening authority for inquiry and, if appropriate, remedial action.[22] When the unlawful command influence issue surfaces after referral of the case, the convening authority still may take remedial action that could involve granting complete relief to the accused if merited. If the convening authority chooses not to take remedial action, or the issue arises during trial, trial counsel have an ethical duty to report the issue to the military judge.[23] Trial counsel must take this action because the existence of command influence can operate as a fraud on the court.[24] Moreover, the issue is best developed at the trial court level because of the availability of witnesses and evidence.

Raising the Issue—Defense Counsel

Counsel for the accused may raise a meritorious issue of command influence to the convening authority, or to the military judge through a motion to dismiss or for appropriate relief.[25] The ethical obligation to raise the issue also applies to counsel for the accused. The issue cannot be waived in a pretrial agreement and any *sub rosa* agreements must be revealed to the military judge.[26] Therefore, defense counsel

---

[14] *See, e.g.*, United States v. Cruz, 20 M.J. 873 (A.C.M.R. 1985) *rev'd in part on other grounds*, 25 M.J. 326 (C.M.A. 1987); *Hagen*, 25 M.J. at 78.

[15] *Hagen*, 25 M.J. at 86.

[16] DEP'T OF ARMY, REG. 27-26, LEGAL SERVICES: RULES OF PROFESSIONAL CONDUCT FOR LAWYERS, rule 1.13 (1 May 1992) [hereinafter AR 27-26].

[17] *Id.* rule 2.1.

[18] *Id.*

[19] *Id.* cmt.

[20] United States v. Hagen, 25 M.J. 78, 87 (C.M.A. 1987).

[21] United States v. Kitts, 23 M.J. 105, 108 (C.M.A. 1986).

[22] The existence of an unlawful command influence issue should be disclosed to counsel for the accused. MCM, *supra* note 3, R.C.M. 701(a)(6).

[23] United States v. Levite, 25 M.J. 334, 340 (C.M.A. 1987); AR 27-26 *supra* note 16, rule 3.3.

[24] *Levite*, 25 M.J. at 340.

[25] SCHLUETER, MILITARY CRIMINAL JUSTICE: PRACTICE AND PROCEDURE, sec. 6-7 (3d ed. 1992); *accord* AR 27-26, *supra* note 16, rule 3.1.

[26] United States v. Corriere, 24 M.J. 701 (A.C.M.R. 1987).

must avoid the temptation to "sweep under the rug" a command influence issue in order to obtain a favorable pretrial agreement for their client.

Litigating the Issue

The COMA has stated that in cases when unlawful command influence *has been exercised*, no reviewing court may properly affirm findings and sentence unless persuaded beyond a reasonable doubt that the findings and sentence have not been affected by the command influence.[27] Limited guidance, however, exists for military practitioners and lower courts on the mechanics of litigating the issue in the first instance. Moreover, the COMA consciously has avoided the question.[28] Nevertheless, in the interest of justice, trial courts should address such issues whenever possible. In that spirit, the Navy and Marine Corps Court of Military Review provides effective guidance in *United States v. Allen.*[29]

The court in *Allen* provides that when determining whether unlawful command influence "has been exercised," the accused has the burden of going forward with evidence sufficient to raise the issue.[30] This approach is consistent with R.C.M. 905, which places the initial burden on the moving party—except on motions to dismiss because of lack of jurisdiction, denial of a speedy trial, or the running of the statute of limitations—when the burden falls on the government.[31] Several courts have stated that mere unsupported assertions or speculation by the accused, or establishing a *possibility* of unlawful command influence, is not sufficient to raise the issue.[32]

The accused's burden includes: (1) asserting the facts of his or her allegation with sufficient particularity and substantiation so that if true, any reasonable person only could conclude that unlawful influence existed; (2) declaring that the proceedings were unfair; and (3) showing that the unlawful command influence was the proximate cause of that unfairness.[33]

If the accused meets his burden, a rebuttable presumption of unlawful command influence is raised. The burden then shifts to the government to show, by clear and convincing evidence, that unlawful command influence does not exist or did not prejudice the accused.[34] If the government fails to rebut the presumption the military judge must fashion an appropriate remedy.

Conclusion

Unlawful command influence is the most elusive and troublesome issue facing military practitioners and their clients. Both the government and counsel for the accused have a duty to protect the court-martial process from unlawful command influence. The COMA rightfully admonishes those in the field to inquire into and completely develop such issues at the convening authority or trial court level. Nevertheless, the COMA has declined to provide definitive guidance on the manner in which the issue is to be litigated. Absent specific guidance from the COMA, military practitioners and lower courts should follow the framework for litigation set forth in *Allen*. Captain DeGiusti.

---

[27] United States v. Thomas, 22 M.J. 388, 394 (C.M.A. 1986).

[28] *Levite*, 25 M.J. at 341 (Cox, J., concurring). In *Levite* Judge Cox writes,

> The unfortunate aspect of the debate is that we, as lawyers, tend to reach an impasse on the legal technicalities of the matter. Who has the burden of proof? Who has the initial 'burden of persuasion'? This Court has not and, in my judgement, should not even attempt to assign these burdens.

Id.

In the same paragraph, however, Judge Cox goes on to provide—"[g]enerally"—the mechanical guidelines for litigation that the court of review relied on in *Allen*. *Id.* When it affirmed the lower court decision in *Allen*, the COMA, in an opinion authored by Judge Cox, was silent concerning the framework for litigation established by the lower court.

[29] United States v. Allen, 31 M.J. 572, 590 (N.M.C.M.R. 1990).

[30] *Id.*

[31] MCM, *supra* note 3, R.C.M. 905 (c)(2)(A), (B). The alleged exercise, at any level, of unlawful command influence is not jurisdictional; see United States v. Blaylock, 15 M.J. 190, 193 (C.M.A. 1983) (repudiating in part, United States v. Hardy, 4 M.J. 20 (C.M.A. 1977)).

[32] *See, e.g.*, Green v. Widdecke, 42 C.M.R. 1978 (C.M.A. 1970); United States v. Cruz, 20 M.J. 873 (A.C.M.R. 1985) *rev'd in part on other grounds*, 25 M.J. 326 (C.M.A. 1987); United States v. Serino, 24 M.J. 848 (A.F.C.M.R. 1987).

[33] *Allen*, 31 M.J. at 591; *United States v. Levite*, 25 M.J. 334, 341 (C.M.A. 1987) (Cox, J., concurring). Although expressly not assigning a "burden," Judge Cox writes in *Levite*,

> An appellant who claims his court-martial has been unlawfully influenced had better declare and show that the proceedings were unfair and that the proximate cause of the unfairness resulted from unlawful command influence. If no causal connection between command influence and the injury (i.e., the 'unfair trial') appears, then an accused is not entitled to relief.

Levite, 25 M.J. at 341.

[34] *Allen*, 31 M.J. at 591.

CLE News

1. Resident Course Quotas

Attendance at resident CLE courses at The Judge Advocate General's School (TJAGSA) is restricted to those who have been allocated student quotas. Quotas for TJAGSA CLE courses are managed by means of the Army Training Requirements and Resources System (ATRRS), the Army-wide automated quota management system. The ATRRS school code for TJAGSA is 181. **If you do not have a confirmed quota in ATRRS, you do not have a quota for a TJAGSA CLE course.** Active duty service members must obtain quotas through their directorates of training or through equivalent agencies. Reservists must obtain quotas through their unit training offices or, if they are nonunit reservists, through ARPERCEN, ATTN: DARP-OPS-JA, 9700 Page Boulevard, St. Louis, MO 63132-5200. Army National Guard personnel request quotas through their unit training offices. To verify a quota, ask your training office to provide you with a screen print of the ATRRS R1 screen showing by-name reservations.

2. TJAGSA CLE Course Schedule

1993

4-8 October: 1993 JAG Annual Continuing Legal Education Workshop (5F-JAG).

14-15 October: Appellate Judges Conference.

18-22 October: USAREUR Criminal Law CLE (5F-F35E).

18 October-22 December: 132d Basic Course (5-27-C20).

18-22 October: 33d Legal Assistance Course (5F-F23).

25-29 October: 120th Senior Officers' Legal Orientation Course (5F-F1).

25-29 October: 55th Law of War Workshop (5F-F42).

1-5 November: 31st Criminal Trial Advocacy Course (5F-F32).

15-19 November: 37th Fiscal Law Course (5F-F12).

(Note: Some states may withhold continuing legal education credit for attendance at the Fiscal Law Course because nonattorneys attend the course).

29 November-3 December: 17th Operational Law Seminar (5F-F47).

2-3 December: 2d Procurement Fraud Orientation (5F-F37).

6-10 December: USAREUR Operational Law CLE (5F-F47E).

6-10 December: 121st Senior Officers' Legal Orientation Course (5F-F1).

1994

3-7 January: 44th Federal Labor Relations Course (5F-F22).

10-13 January: USAREUR Tax CLE (5F-F28E).

10-14 January: 1994 Government Contract Law Symposium (5F-F11).

18 January-25 March: 133d Basic Course (5-27-C20).

24-28 January: PACOM Tax CLE (5F-F28P).

31 January-4 February: 32d Criminal Trial Advocacy Course (5F-F32).

7-11 February: 122d Senior Officers' Legal Orientation Course (5F-F1).

22 February-4 March: 132d Contract Attorneys' Course (5F-F10).

7-11 March: USAREUR Fiscal Law CLE (5F-F12E).

(Note: Some states may withhold continuing legal education credit for attendance at the Fiscal Law Course because nonattorneys attend the course).

7-11 March: 34th Legal Assistance Course (5F-F23).

21-25 March: 18th Administrative Law for Military Installations Course (5F-F24).

28 March-1 April: 7th Government Materiel Acquisition Course (5F-F17).

4-8 April: 18th Operational Law Seminar (5F-F47).

11-15 April: 123d Senior Officers' Legal Orientation Course (5F-F1).

11-15 April: 56th Law of War Workshop (5F-F42).

18-21 April: 1994 Reserve Component Judge Advocate Workshop (5F-F56).

25-29 April: 5th Law for Legal NCOs Course (512-71D/E/20/30).

2-6 May: 38th Fiscal Law Course (5F-F12).

(Note: Some states may withhold continuing legal education credit for attendance at the Fiscal Law Course because nonattorneys attend the course).

16-20 May: 39th Fiscal Law Course (5F-F12).

(Note: Some states may withhold continuing legal education credit for attendance at the Fiscal Law Course because nonattorneys attend the course).

16 May-3 June: 37th Military Judges' Course (5F-F33).

23-27 May: 45th Federal Labor Relations Course (5F-F22).

6-10 June: 124th Senior Officers' Legal Orientation Course (5F-F1).

13-17 June: 24th Staff Judge Advocate Course (5F-F52).

20 June-1 July: JAOAC (Phase II) (5F-F55).

20 June-1 July: JATT Team Training (5F-F57).

6-8 July: Professional Recruiting Training Seminar.

11-15 July: 5th Legal Administrators' Course (7A-550A1).

13-15 July: 25th Methods of Instruction Course (5F-F70).

18-29 July: 133d Contract Attorneys' Course (5F-F10).

18 July-23 September: 134th Basic Course (5-27-C20).

1-5 August: 57th Law of War Workshop (5F-F42).

1 August 1994-12 May 1995: 43d Graduate Course (5-27-C22).

8-12 August: 18th Criminal Law New Developments Course (5F-F35).

15-19 August: 12th Federal Litigation Course (5F-F29).

15-19 August: 4th Senior Legal NCO Management Course (512-71D/E/40/50).

22-26 August: 125th Senior Officers' Legal Orientation Course (5F-F1).

29 August-2 September: 19th Operational Law Seminar (5F-F47).

7-9 September: USAREUR Legal Assistance CLE (5F-F23E).

12-16 September: USAREUR Administrative Law CLE (5F-F24E).

12-16 September: 11th Contract Claims, Litigation and Remedies Course (5F-F13).

3. Civilian Sponsored CLE Courses

December 1993

1-3, ESI: International Contracting, Washington, D.C.

2, NYSBA: Forming and Advising the Not-for-Profit Corporation, New York, NY.

2, NYSBA: Trial of a Felony Case, Long Island, NY.

3, NYSBA: How to Try a Commercial Case, Rochester, NY.

3, NYSBA: How to Try a Commercial Case, Albany, NY.

3-4, ABA: Dynamics of Corporate Control, New York, NY.

5-9, NCDA: Forensic Evidence, Orlando, FL.

6, GWU: Joint Ventures and Teaming Arrangements, Washington, D.C.

6-10, ESI: Federal Contracting Basics, San Diego, CA.

6-10, ESI: Operating Practices in Contract Administration, Washington, D.C.

7, PBI: Ethical Issues Affecting Domestic Relations Lawyers, Philadelphia, PA.

7-8, GII: Environmental Laws and Regulations Compliance Course, New Orleans, LA.

7-10, ESI: Negotiation Strategies and Techniques, San Diego, CA.

7-10, ESI: ADP/Telecommunications (FIP) Contracting, Washington, D.C.

8-10, GWU: Federal Procurement of Architect and Engineer Services, Washington, D.C.

10, NYSBA: New York Appellate Practice, Albany, NY.

13-17, ESI: Managing Projects in Organizations, Washington, D.C.

13-17, GWU: Construction Contracting, Washington, D.C.

15, PBI: Ethical Issues for Estate Lawyers, Pittsburgh, PA.

16-17, WFU: Practical Family Law, Charlotte, NC.

16-17, WFU: Personnel Law Symposium, Atlanta, GA.

For further information on civilian courses, please contact the institution offering the course. The addresses are listed below.

AAA: American Arbitration Association, 140 West 51st Street, New York, NY 10020. (212) 484-4006.

AAJE: American Academy of Judicial Education, 1613 15th Street - Suite C, Tuscaloosa, AL 35404. (205) 391-9055.

AALL: American Association of Law Libraries, 53 West Jackson Blvd., Suite 940, Chicago, IL 60604. (312) 939-4764.

ABA: American Bar Association, 750 North Lake Shore Drive, Chicago, IL 60611. (312) 988-6200.

ABICLE: Alabama Bar Institute for Continuing Legal Education, P.O. Box 870384, Tuscaloosa, AL 35487-0384. (205) 348-6230.

AICLE: Arkansas Institute for CLE, 400 West Markham, Little Rock, AR 72201. (501) 375-3957.

AKBA: Alaska Bar Association, P.O. Box 100279, Anchorage, AK 99510. (907) 272-7469.

ALIABA: American Law Institute-American Bar Association Committee on Continuing Professional Education, 4025 Chestnut Street, Philadelphia, PA 19104-3099. (800) CLE-NEWS; (215) 243-1600.

ASLM: American Society of Law and Medicine, Boston University School of Law, 765 Commonwealth Avenue, Boston, MA 02215. (617) 262-4990.

CLEC: Continuing Legal Education in Colorado, Inc., 1900 Grant Street, Suite 900, Denver, CO 80203. (303) 860-0608.

CLESN: CLE Satellite Network, 920 Spring Street, Springfield, IL 62704. (217) 525-0744, (800) 521-8662.

EEI: Executive Enterprises, Inc., 22 W. 21st Street, New York, NY 10010-6904. (800) 332-1105.

ESI: Educational Services Institute, 5201 Leesburg Pike, Suite 600, Falls Church, VA 22041-3203. (703) 379-2900.

FB: Florida Bar, 650 Apalachee Parkway, Tallahassee, FL 32399-2300. (904) 222-5286.

FBA: Federal Bar Association, 1815 H Street, NW., Suite 408, Washington, D.C. 20006-3697. (202) 638-0252.

GICLE: The Institute of Continuing Legal Education in Georgia, P.O. Box 1885, Athens, GA 30603. (706) 369-5664.

GII: Government Institutes, Inc., 966 Hungerford Drive, Suite 24, Rockville, MD 20850. (301) 251-9250.

GWU: Government Contracts Program, The George Washington University, National Law Center, 2020 K Street, N.W., Room 2107, Washington, D.C. 20052. (202) 994-5272.

ICLEF: Indiana CLE Forum, Suite 202, 230 East Ohio Street, Indianapolis, IN 46204. (317) 637-9102.

IICLE: Illinois Institute for CLE, 2395 W. Jefferson Street, Springfield, IL 62702. (217) 787-2080.

KBA: Kansas Bar Association, 1200 Harrison Street, P.O. Box 1037, Topeka, KS 66601. (913) 234-5696.

LEI: Law Education Institute, 5555 N. Port Washington Road, Milwaukee, WI 53217. (414) 961-1955.

LRP: LRP Publications, 1555 King Street, Suite 200, Alexandria, VA 22314. (703) 684-0510, (800) 727-1227.

LSU: Louisiana State University, Center of Continuing Professional Development, Paul M. Herbert Law Center, Baton Rouge, LA 70803-1008. (504) 388-5837.

MBC: Missouri Bar Center, 326 Monroe St., P.O. Box 119, Jefferson City, MO 65102. (314) 635-4128.

MCLE: Massachusetts Continuing Legal Education, Inc., 20 West Street, Boston, MA 02111. (800) 632-8077; (617) 482-2205.

MICLE: Institute of Continuing Legal Education, 1020 Greene Street, Ann Arbor, MI 48109-1444. (313) 764-0533; (800) 922-6516.

MLI: Medi-Legal Institute, 15301 Ventura Boulevard, Suite 300, Sherman Oaks, CA 91403. (800) 443-0100.

NCBF: North Carolina Bar Foundation, 1312 Annapolis Drive, P.O. Box 12806, Raleigh, NC 27605. (919) 828-0561.

NCDA: National College of District Attorneys, University of Houston Law Center, 4800 Calhoun Street, Houston, TX 77204-6380. (713) 747-NCDA.

NCJFC: National Council of Juvenile and Family Court Judges, University of Nevada, P.O. Box 8970, Reno, NV 89507. (702) 784-4836.

NCLE: Nebraska CLE, Inc., 635 South 14th Street, P.O. Box 81809, Lincoln, NB 68501. (402) 475-7091.

NELI: National Employment Law Institute, 444 Magnolia Avenue, Suite 200, Larkspur, CA 94939. (415) 924-3844.

NITA: National Institute for Trial Advocacy, 1507 Energy Park Drive, St. Paul, MN 55108. (800) 225-6482; (612) 644-0323 in (MN and AK).

NJC: National Judicial College, Judicial College Building, University of Nevada, Reno, NV 89557. (702) 784-6747.

NJCLE: New Jersey Institute for CLE, One Constitution Square, New Brunswick, NJ 08901-1500. (201) 249-5100.

NKU: Northern Kentucky University, Chase College of Law, Office of Continuing Legal Education, Highland Heights, KY 41076. (606) 572-5380.

NLADA: National Legal Aid & Defender Association, 1625 K Street, NW., Eighth Floor, Washington, D.C. 20006. (202) 452-0620.

NMTLA: New Mexico Trial Lawyers' Association, P.O. Box 301, Albuquerque, NM 87103. (505) 243-6003.

NWU: Northwestern University School of Law, 357 East Chicago Avenue, Chicago, IL 60611-3069. (312) 503-8932.

NYSBA: New York State Bar Association, One Elk Street, Albany, NY 12207. (518) 463-3200; (800) 582-2452.

PBI: Pennsylvania Bar Institute, 104 South Street, P.O. Box 1027, Harrisburg, PA 17108-1027. (800) 932-4637; (717) 233-5774.

PHLB: Prentice-Hall Law and Business, 270 Sylvan Avenue, Englewood Cliffs, NJ 07632. (800) 223-0231, (201) 894-8260.

PLI: Practising Law Institute, 810 Seventh Avenue, New York, NY 10019. (212) 765-5700.

SBA: State Bar of Arizona, 363 North First Avenue, Phoenix, AZ 85003. (602) 252-4804.

SBT: State Bar of Texas, Professional Development Program, Capitol Station, P.O. Box 12487, Austin, TX 78711. (512) 463-1437.

SCB: South Carolina Bar, Continuing Legal Education, P.O. Box 608, Columbia, SC 29202-0608. (803) 799-6653.

SLF: Southwestern Legal Foundation, P.O. Box 830707, Richardson, TX 75080-0707. (214) 690-2377.

TBA: Tennessee Bar Association, 3622 West End Avenue, Nashville, TN 37205. (615) 383-7421.

TLS: Tulane Law School, Tulane University CLE, 8200 Hampson Avenue, Suite 300, New Orleans, LA 70118. (504) 865-5900.

TPI: The Philadelphia Institute, 2133 Arch Street, Philadelphia, PA 19103. (215) 567-4000.

UCCI: Uniform Commercial Code Institute, P.O. Box 812, Carlisle, PA 17013. (717) 249-6831.

UKCL: University of Kentucky, College of Law, Office of CLE, Suite 260 Law Building, Lexington, KY 40506-0048. (606) 257-2922.

UMLC: University of Miami Law Center, P.O. Box 248087, Coral Gables, FL 33124. (305) 284-4762.

USB: Utah State Bar, 645 South 200 East, Salt Lake City, UT 84111-3834. (801) 531-9077.

VACLE: Committee of Continuing Legal Education of the Virginia Law Foundation, School of Law, University of Virginia, Charlottesville, VA 22901. (804) 924-3416.

WFU: Wake Forest University, School of Law—CLE, Box 7206 Reynolds Station, Winston-Salem, NC 27109-7206. (919) 761-5560.

WSBA: Washington State Bar Association, Continuing Legal Education, 500 Westin Building, 2001 Sixth Avenue, Seattle, WA 98121-2599. (206) 448-0433.

4. Mandatory Continuing Legal Education Jurisdictions and Reporting Dates

Jurisdiction	Reporting Month
Alabama**	31 December annually
Arizona	15 July annually
Arkansas	30 June annually
California*	1 February annually
Colorado	Anytime within three-year period
Delaware	31 July biennially
Florida**	Assigned month triennially
Georgia	31 January annually

Jurisdiction	Reporting Month
Idaho	Admission date triennially
Indiana	31 December annually
Iowa	1 March annually
Kansas	1 July annually
Kentucky	30 June annually
Louisiana**	31 January annually
Michigan	31 March annually
Minnesota	30 August triennially
Mississippi**	1 August annually
Missouri	31 July annually
Montana	1 March annually
Nevada	1 March annually
New Hampshire**	1 August annually
New Mexico	30 days after program
North Carolina**	28 February annually
North Dakota	31 July annually
Ohio*	31 January biennially
Oklahoma**	15 February annually
Oregon	Anniversary of date of birth—new admittees and reinstated members report after an initial one-year period; thereafter triennially
Pennsylvania**	Annually as assigned
South Carolina**	15 January annually
Tennessee*	1 March annually
Texas	Last day of birth month annually
Utah	31 December biennially
Vermont	15 July biennially
Virginia	30 June annually
Washington	31 January annually
West Virginia	30 June biennially
Wisconsin*	20 January biennially
Wyoming	30 January annually

For addresses and detailed information, see the July 1993 issue of *The Army Lawyer.*

*Military exempt

**Military must declare exemption

Current Material of Interest

1. TJAGSA Materials Available Through Defense Technical Information Center

Each year, TJAGSA publishes deskbooks and materials to support resident instruction. Much of this material is useful to judge advocates and government civilian attorneys who are unable to attend courses in their practice areas. The School receives many requests each year for these materials. Because the distribution of these materials is not in the School's mission, TJAGSA does not have the resources to provide these publications.

To provide another avenue of availability, some of this material is being made available through the Defense Technical Information Center (DTIC). An office may obtain this material in two ways. The first is through a user library on the installation. Most technical and school libraries are DTIC "users." If they are "school" libraries, they may be free users. The second way is for the office or organization to become a government user. Government agency users pay five dollars per hard copy for reports of 1-100 pages and seven cents for each additional page over 100, or ninety-five cents per fiche copy. Overseas users may obtain one copy of a report at no charge. The necessary information and forms to become registered as a user may be requested from: Defense Technical Information Center, Cameron Station, Alexandria, VA 22314-6145, telephone: commercial (703) 274-7633, DSN 284-7633.

Once registered, an office or other organization may open a deposit account with the National Technical Information Service to facilitate ordering materials. Information concerning this procedure will be provided when a request for user status is submitted.

Users are provided biweekly and cumulative indices. These indices are classified as a single confidential document and mailed only to those DTIC users whose organizations have a facility clearance. This will not affect the ability of organizations to become DTIC users, nor will it affect the ordering of TJAGSA publications through DTIC. All TJAGSA publications are unclassified and the relevant ordering information, such as DTIC numbers and titles, will be published in *The Army Lawyer.* The following TJAGSA publications are available through DTIC. The nine character identifier beginning with the letters AD are numbers assigned by DTIC and must be used when ordering publications.

Contract Law

*AD A265755 Government Contract Law Deskbook Vol 1/JA-501-1-93 (499 pgs).

*AD A265756 Government Contract Law Deskbook, Vol 2/JA-501-2-93 (481 pgs).

AD B144679 Fiscal Law Course Deskbook/JA-506-90 (270 pgs).

Legal Assistance

AD B092128 USAREUR Legal Assistance Handbook/ JAGS-ADA-85-5 (315 pgs).

AD A263082 Real Property Guide—Legal Assistance/JA-261(93) (293 pgs).

AD A259516 Legal Assistance Guide: Office Directory/ JA-267(92) (110 pgs).

AD B164534 Notarial Guide/JA-268(92) (136 pgs).

AD A228272 Legal Assistance: Preventive Law Series/ JA-276-90 (200 pgs).

*AD A266077 Soldiers' and Sailors' Civil Relief Act Guide/JA-260(93) (206 pgs).

*AD A266177 Wills Guide/JA-262(93) (464 pgs).

AD A244032 Family Law Guide/JA 263-91 (711 pgs).

*AD A266351 Office Administration Guide/JA 271(93) (230 pgs).

AD B156056 Legal Assistance: Living Wills Guide/JA-273-91 (171 pgs).

AD A241255 Model Tax Assistance Guide/JA 275-91 (66 pgs).

AD A246280 Consumer Law Guide/JA 265-92 (518 pgs).

AD A259022 Tax Information Series/JA 269(93) (117 pgs).

AD A256322 Legal Assistance: Deployment Guide/JA-272 (92) (364 pgs).

AD A260219 Air Force All States Income Tax Guide—January 1993.

Administrative and Civil Law

AD A199644 The Staff Judge Advocate Officer Manager's Handbook/ACIL-ST-290.

AD A258582 Environmental Law Deskbook, JA-234-1(92) (517 pgs).

AD A255038 Defensive Federal Litigation/JA-200(92) (840 pgs).

AD A255346 Reports of Survey and Line of Duty Determinations/JA 231-92 (89 pgs).

AD A255064 Government Information Practices/JA-235(92) (326 pgs).

AD A259047 AR 15-6 Investigations/JA-281(92) (45 pgs).

Labor Law

AD A256772 The Law of Federal Employment/JA-210 (92) (402 pgs).

AD A255838 The Law of Federal Labor-Management Relations/JA-211-92 (430 pgs).

Developments, Doctrine, and Literature

AD A254610 Military Citation, Fifth Edition/JAGS-DD-92 (18 pgs).

Criminal Law

AD A260531 Crimes and Defenses Deskbook/JA 337(92) (220 pgs).

AD A260913 Unauthorized Absences/JA 301(92) (86 pgs).

AD A251120 Criminal Law, Nonjudicial Punishment/JA-330(92) (40 pgs).

AD A251717 Senior Officers Legal Orientation/JA 320(92) (249 pgs).

AD A251821 Trial Counsel and Defense Counsel Handbook/JA 310(92) (452 pgs).

AD A261247 United States Attorney Prosecutions/JA-338(92) (343 pgs).

International Law

AD A262925 Operational Law Handbook (Draft)/JA-422 (93) (180 pgs).

Reserve Affairs

AD B136361 Reserve Component JAGC Personnel Policies Handbook/JAGS-GRA-89-1 (188 pgs).

The following CID publication also is available through DTIC:

AD A145966 USACIDC Pam 195-8, Criminal Investigations, Violation of the USC in Economic Crime Investigations (250 pgs).

Those ordering publications are reminded that they are for government use only.

*Indicates new publication or revised edition.

2. Regulations and Pamphlets

a. *Obtaining* Manuals for Courts-Martial, *DA Pamphlets, Army Regulations, Field Manuals, and Training Circulars.*

(1) The U.S. Army Publications Distribution Center (USAPDC) at Baltimore stocks and distributes DA publications and blank forms that have Army-wide use. Its address is:

Commander
U.S. Army Publications Distribution Center
2800 Eastern Blvd.
Baltimore, MD 21220-2896

(2) Units must have publications accounts to use any part of the publications distribution system. The following extract from *Department of the Army Regulation 25-30, The Army Integrated Publishing and Printing Program,* paragraph 12-7c (28 February 1989) is provided to assist Active, Reserve, and National Guard units.

> The units below are authorized publications accounts with the USAPDC.
>
> (*1*) *Active Army.*
>
> (*a*) *Units organized under a PAC.* A PAC that supports battalion-size units will request a consolidated publications account for the entire battalion except when subordinate units in the battalion are geographically remote. To establish an account, the PAC will forward a DA Form 12-R (Request for Establishment of a Publications Account) and supporting DA 12-series forms through their DCSIM or DOIM, as appropriate, to the Baltimore USAPDC, 2800 Eastern Boulevard, Baltimore, MD 21220-2896. The PAC will manage all accounts established for the battalion it supports. (Instructions for the use of DA 12-series forms and a reproducible copy of the forms appear in DA Pam. 25-33.)
>
> (*b*) *Units not organized under a PAC.* Units that are detachment size and above may have a publications account. To establish an account, these units will submit a DA Form 12-R and supporting DA 12-series forms through their DCSIM or DOIM, as appropriate, to the Baltimore USAPDC, 2800 Eastern Boulevard, Baltimore, MD 21220-2896.
>
> (*c*) *Staff sections of FOAs, MACOMs, installations, and combat divisions.* These staff sections may establish a single account for each major staff element. To establish an account, these units will follow the procedure in (*b*) above.
>
> (*2*) *ARNG units that are company size to State adjutants general.* To establish an account, these units will submit a DA Form 12-R and supporting DA 12-series forms through their State adjutants general to the Baltimore USAPDC, 2800 Eastern Boulevard, Baltimore, MD 21220-2896.
>
> (*3*) *USAR units that are company size and above and staff sections from division level and above.* To establish an account, these units will submit a DA Form 12-R and supporting DA 12-series forms through their supporting installation and CONUSA to the Baltimore USAPDC, 2800 Eastern Boulevard, Baltimore, MD 21220-2896.
>
> (*4*) *ROTC elements.* To establish an account, ROTC regions will submit a DA Form 12-R and supporting DA 12-series forms through their supporting installation and TRADOC DCSIM to the Baltimore USAPDC, 2800 Eastern Boulevard, Baltimore, MD 21220-2896. Senior and junior ROTC units will submit a DA Form 12-R and supporting DA 12-series forms through their supporting installation, regional headquarters, and TRADOC DCSIM to the Baltimore USAPDC, 2800 Eastern Boulevard, Baltimore, MD 21220-2896.
>
> Units not described in [the paragraphs] above also may be authorized accounts. To establish accounts, these units must send their requests through their DCSIM or DOIM, as appropriate, to Commander, USAPPC, ATTN: ASQZ-NV, Alexandria, VA 22331-0302.
>
> Specific instructions for establishing initial distribution requirements appear in DA Pam. 25-33.

If your unit does not have a copy of *DA Pam. 25-33*, you may request one by calling the Baltimore USAPDC at (410) 671-4335.

(3) Units that have established initial distribution requirements will receive copies of new, revised, and changed publications as soon as they are printed.

(4) Units that require publications that are not on their initial distribution list can requisition publications using *DA Form 4569*. All *DA Form 4569* requests will be sent to the Baltimore USAPDC, 2800 Eastern Boulevard, Baltimore, MD 21220-2896. You may reach this office at (410) 671-4335.

(5) Civilians can obtain DA Pams through the National Technical Information Service (NTIS), 5285 Port Royal Road, Springfield, Virginia 22161. You may reach this office at (703) 487-4684.

(6) Navy, Air Force, and Marine Corps JAGs can request up to ten copies of DA Pams by writing to USAPDC, ATTN: DAIM-APC-BD, 2800 Eastern Boulevard, Baltimore, MD 21220-2896. You may reach this office at (410) 671-4335.

b. *Listed below are new publications and changes to existing publications.*

Number	Title	Date
AR 5-14	Management of Contracted Advisory and Assistance Services	15 Jan 93
AR 30-18	Army Troop Issue Subsistence Activity Operating Policies	4 Jan 93
AR 135-156	Military Publications Personnel Management of General Officers, Interim Change 101	1 Feb 93
CIR 11-92-3	Internal Control Review Checklist	31 Oct 92
CIR 608-93-1	The Army Family Action Plan X	15 Jan 93
JFTR	Joint Federal Travel Regulations, Change 75	1 Mar 93
UPDATE 16	Enlisted Ranks Personnel Update Handbook, Change 3	27 Nov 93

3. LAAWS Bulletin Board Service

a. The Legal Automation Army-Wide System (LAAWS) operates an electronic bulletin board (BBS) dedicated to serving the Army legal community and certain approved DOD agencies. The LAAWS BBS is the successor to the OTJAG BBS formerly operated by the OTJAG Information Management Office. Access to the LAAWS BBS currently is restricted to the following individuals:

1) Active duty Army judge advocates;

2) Civilian attorneys employed by the Department of the Army;

3) Army Reserve and Army National Guard judge advocates on active duty, or employed full time by the federal government;

4) Active duty Army legal administrators, noncommissioned officers, and court reporters;

5) Civilian legal support staff employed by the Judge Advocate General's Corps, U.S. Army;

6) Attorneys (military and civilian) employed by certain supported DOD agencies (e.g., DLA, CHAMPUS, DISA, HQS); and

7) Individuals with approved, written exceptions to policy.

Requests for exceptions to the access policy should be submitted to the following address:

LAAWS Project Officer
Attn: LAAWS BBS SYSOPS
Mail Stop 385, Bldg. 257
Fort Belvoir, VA 22060-5385

b. Effective 2 November 1992, the LAAWS BBS system was activated at its new location, the LAAWS Project Office at Fort Belvoir, Virginia. In addition to this physical transition, the system has undergone a number of hardware and software upgrades. The system now runs on a 80486 tower, and all lines are capable of operating at speeds up to 9600 baud. While these changes will be transparent to the majority of users, they will increase the efficiency of the BBS, and provide faster access to those with high-speed modems.

c. Numerous TJAGSA publications are available on the LAAWS BBS. Users can sign on by dialing commercial (703) 805-3988, or DSN 655-3988 with the following telecommunications configuration: 9600/2400/1200 baud; parity-none; 8 bits; 1 stop bit; full duplex; Xon/Xoff supported; VT100 or ANSI terminal emulation. Once logged on, the system greets the user with an opening menu. Members need only answer the prompts to call up and download desired publications. The system will ask a new user to answer several questions and tell him or her that access will be granted to the LAAWS BBS after receiving membership confirmation, which takes approximately twenty-four hours. *The Army Lawyer* will publish information on new publications and materials as they become available through the LAAWS BBS.

d. *Instructions for Downloading Files From the LAAWS Bulletin Board Service.*

(1) Log on to the LAAWS BBS using ENABLE and the communications parameters listed in subparagraph c, above.

(2) If you have never downloaded files before, you will need the file decompression utility program that the LAAWS BBS uses to facilitate rapid transfer over the phone lines. This program is known as the PKUNZIP utility. To download it on to your hard drive, take the following actions after logging on:

(a) When the system asks, "Main Board Command?" Join a conference by entering [j].

(b) From the Conference Menu, select the Automation Conference by entering [12] and hit the enter key when ask to view other conference members.

(c) Once you have joined the Automation Conference, enter [d] to Download a file off the Automation Conference menu.

(d) When prompted to select a file name, enter [pkz 110.exe]. This is the PKUNZIP utility file.

(e) If prompted to select a communications protocol, enter [x] for X-modem protocol.

(f) The system will respond by giving you data such as download time and file size. You should then press the F10 key, which will give you a top-line menu. If you are using ENABLE 3.XX from this menu, select [f] for Files, followed by [r] for Receive, followed by [x] for X-modem protocol. The menu will then ask for a file name. Enter [c:\pkz110.exe].

(g) If you are using ENABLE 4.0 select the PROTOCOL option and select which protocol you wish to use X-modem-checksum. Next select the RECEIVE option and enter the file name "pkz110.exe" at the prompt.

(h) The LAAWS BBS and your computer will take over from here. Downloading the file takes about fifteen to twenty minutes. ENABLE will display information on the progress of the transfer as it occurs. Once the operation is complete the BBS will display the message "File transfer completed.." and information on the file. Your hard drive now will have the compressed version of the decompression program needed to explode files with the ".ZIP" extension.

(i) When the file transfer is complete, enter [a] to Abandon the conference. Then enter [g] for Good-bye to log-off the LAAWS BBS.

(j) To use the decompression program, you will have to decompress, or "explode," the program itself. To accomplish this, boot-up into DOS and enter [pkz110] at the C:\> prompt. The PKUNZIP utility will then execute, converting its files to usable format. When it has completed this process, your hard drive will have the usable, exploded version of the PKUNZIP utility program, as well as all of the compression/decompression utilities used by the LAAWS BBS.

(3) To download a file, after logging on to the LAAWS BBS, take the following steps:

(a) When asked to select a "Main Board Command?" enter [d] to Download a file.

(b) Enter the name of the file you want to download from subparagraph c, below. A listing of available files can be viewed by selecting File Directories from the main menu.

(c) When prompted to select a communications protocol, enter [x] for X-modem (ENABLE) protocol.

(d) After the LAAWS BBS responds with the time and size data, you should press the F10 key, which will give you the ENABLE top-line menu. If you are using ENABLE 3.XX select [f] for Files, followed by [r] for Receive, followed by [x] for X-modem protocol. If you are using ENABLE 4.0 select the PROTOCOL option and select which protocol you wish to use X-modem-checksum. Next select the RECEIVE option.

(e) When asked to enter a file name enter [c:\xxxxx.yyy] where xxxxx.yyy is the name of the file you wish to download.

(f) The computers take over from here. Once the operation is complete the BBS will display the message "File transfer completed.." and information on the file. The file you downloaded will have been saved on your hard drive.

(g) After the file transfer is complete, log off of the LAAWS BBS by entering [g] to say Good-bye.

(4) To use a downloaded file, take the following steps:

(a) If the file was not compressed, you can use it in ENABLE without prior conversion. Select the file as you would any ENABLE word processing file. ENABLE will give you a bottom-line menu containing several other word processing languages. From this menu, select "ASCII." After the document appears, you can process it like any other ENABLE file.

(b) If the file was compressed (having the ".ZIP" extension) you will have to "explode" it before entering the ENABLE program. From the DOS operating system C:\> prompt, enter [pkunzip{space}xxxxx.zip] (where "xxxxx.zip" signifies the name of the file you downloaded from the LAAWS BBS). The PKUNZIP utility will explode the compressed file and make a new file with the same name, but with a new ".DOC" extension. Now enter ENABLE and call up the exploded file "XXXXX.DOC", by following instructions in paragraph (4)(a), above.

e. *TJAGSA Publications Available Through the LAAWS BBS.* The following is a current list of TJAGSA publications available for downloading from the LAAWS BBS (Note that the date UPLOADED is the month and year the file was made available on the BBS; publication date is available within each publication):

FILE NAME	UPLOADED	DESCRIPTION
1990_YIR.ZIP	January 1991	1990 Contract Law Year in Review in ASCII format. It originally was provided at the 1991 Government Contract Law Symposium at TJAGSA.
1991_YIR.ZIP	January 1992	TJAGSA Contract Law 1991 Year in Review Article.
505-1.ZIP	June 1992	Volume 1 of the May 1992 Contract Attorneys Course Deskbook.
505-2.ZIP	June 1992	Volume 2 of the May 1992 Contract Attorneys Course Deskbook.
506.ZIP	November 1991	TJAGSA Fiscal Law Deskbook, Nov. 1991.
93CLASS.ASC	July 1992	FY TJAGSA Class Schedule; ASCII.
93CLASS.EN	July 1992	FY TJAGSA Class Schedule; ENABLE 2.15.
93CRS.ASC	July 1992	FY TJAGSA Course Schedule; ASCII.
93CRS.EN	July 1992	FY TJAGSA Course Schedule; ENABLE 2.15.
ALAW.ZIP	June 1990	*The Army Lawyer/Military Law Review* Database (Enable 2.15). Updated through 1989 Army Lawyer Index. It includes a menu system and an explanatory memorandum, ARLAWMEM.WPF.
CCLR.ZIP	September 1990	Contract Claims, Litigation, Litigation & Remedies.
FISCALBK.ZIP	November 1990	The November 1990 Fiscal Law Deskbook.
FSO_201.ZIP	October 1992	Update of FSO Automation Program.
JA200A.ZIP	August 1992	Defensive Federal Litigation, Part A, Aug. 92.
JA200B.ZIP	August 1992	Defensive Federal Litigation, Part B, Aug. 92.
JA210.ZIP	October 1992	Law of Federal Employment, Oct. 92.
JA211.ZIP	August 1992	Law of Federal Labor-Management Relations, July 92.
JA231.ZIP	October 1992	Reports of Survey and Line of Duty Determinations—Programmed Instruction.
JA235-92.ZIP	August 1992	Government Information Practices, July 92. Updates JA235.ZIP.
JA235.ZIP	March 1992	Government Information Practices.
JA241.ZIP	March 1992	Federal Tort Claims Act.
JA260.ZIP	October 1992	Soldiers' and Sailors' Civil Relief Act Update, Sept. 92.
JA261.ZIP	March 1992	Legal Assistance Real Property Guide.
JA262.ZIP	March 1992	Legal Assistance Wills Guide.
JA267.ZIP	March 1992	Legal Assistance Office Directory.
JA268.ZIP	March 1992	Legal Assistance Notarial Guide.
JA269.ZIP	March 1992	Federal Tax Information Series.
JA271.ZIP	March 1992	Legal Assistance Office Administration Guide.
JA272.ZIP	March 1992	Legal Assistance Deployment Guide.
JA274.ZIP	March 1992	Uniformed Services Former Spouses' Protection Act—Outline and References.
JA275.ZIP	March 1992	Model Tax Assistance Program.
JA276.ZIP	March 1992	Preventive Law Series.
JA281.ZIP	March 1992	AR 15-6 Investigations.
JA285.ZIP	March 1992	Senior Officers' Legal Orientation.
JA285A.ZIP	March 1992	Senior Officers' Legal Orientation Part 1 of 2.
JA285B.ZIP	March 1992	Senior Officers' Legal Orientation Part 2 of 2.
JA290.ZIP	March 1992	SJA Office Managers' Handbook.
JA301.ZIP	July 1991	Unauthorized Absence—Programmed Text, July 92.

FILE NAME	UPLOADED	DESCRIPTION
JA310.ZIP	July 1992	Trial Counsel and Defense Counsel Handbook, July 1992.
JA320.ZIP	July 1992	Senior Officers' Legal Orientation Criminal Law Text, May 92.
JA330.ZIP	July 1992	Nonjudicial Punishment—Programmed Text, Mar. 92.
JA337.ZIP	July 1992	Crimes and Defenses Deskbook, July 92.
JA4221.ZIP	May 1992	Operational Law Handbook, Disk 1 of 2.
JA4222.ZIP	May 1992	Operational Law Handbook, Disk 2 of 2.
JA509.ZIP	Oct 1992	TJAGSA Deskbook from the 9th Contract Claims, Litigation, & Remedies Course held Sept. 92.
JAGSCHL.ZIP	Mar 1992	JAG School Report to DSAT.
ND-BBS.ZIP	July 1992	TJAGSA Criminal Law New Developments Course Deskbook. Aug. 92.
V1YIR91.ZIP	January 1992	Section 1 of the TJAGSA's Annual Year in Review for CY 1991 as presented at the Jan. 92 Contract Law Symposium.
V2YIR91.ZIP	January 1992	Volume 2 of TJAGSA's Annual Review of Contract and Fiscal Law for CY 1991.
V3YIR91.ZIP	January 1992	Volume 3 of TJAGSA's Annual Review of Contract and Fiscal Law for CY 1991.
YIR89.ZIP	January 1990	Contract Law Year in Review—1989.

f. Reserve and National Guard organizations without organic computer telecommunications capabilities, and individual mobilization augmentees (IMA) having bona fide military needs for these publications, may request computer diskettes containing the publications listed above from the appropriate proponent academic division (Administrative and Civil Law; Criminal Law; Contract Law; International Law; or Developments, Doctrine, and Literature) at The Judge Advocate General's School, Charlottesville, VA 22903-1781. Requests must be accompanied by one 5_-inch or 3_-inch blank, formatted diskette for each file. In addition, a request from an IMA must contain a statement which verifies that he or she needs the requested publications for purposes related to his or her military practice of law.

g. Questions or suggestions concerning the availability of TJAGSA publications on the LAAWS BBS should be sent to The Judge Advocate General's School, Literature and Publications Office, ATTN: JAGS-DDL, Charlottesville, VA 22903-1781. For additional information concerning the LAAWS BBS, contact the System Operator, Sergeant First Class Tim Nugent, commercial (703) 805-2922, DSN 655-2922, or at the address in paragraph a, above.

4. TJAGSA Information Management Items

a. Each member of the staff and faculty at The Judge Advocate General's School (TJAGSA) has access to the Defense Data Network (DDN) for electronic mail (e-mail). To pass information to someone at TJAGSA, or to obtain an e-mail address for someone at TJAGSA, a DDN user should send an e-mail message to:

"postmaster@jags2.jag.virginia.edu"

b. Personnel desiring to reach someone at TJAGSA via DSN should dial 934-7115 to get the TJAGSA receptionist; then ask for the extension of the office you wish to reach.

c. The Judge Advocate General's School also has a toll-free telephone number. To call TJAGSA, dial 1-800-552-3978.

5. The Army Law Library System

With the closure and realignment of many Army installations, the Army Law Library System (ALLS) has become the point of contact for redistribution of materials contained in law libraries on those installations. *The Army Lawyer* will continue to publish lists of law library materials made available as a result of base closures. Law librarians having resources available for redistribution should contact Ms. Helena Daidone, JALS-DDS, The Judge Advocate General's School, U.S. Army, Charlottesville, VA 22903-1781. Telephone numbers are DSN 274-7115, ext. 394, commercial (804) 972-6394, or facsimile (804) 972-6386.

*U.S. Government Printing Office: 1993 — 341-976/80007